Supreme Court of the United States

OCTOBER TERM, 1966

No. 77

LAWRENCE LONG, PETITIONER

vs.

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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[fol. 1]

JUSTICE'S TRANSCRIPT CRIMINAL CASES AND FEES

STATE OF IOWA

vs.

LAWRENCE LONG

(Filed April 11, 1963)

Before W. E. MINER J. P. Oskaloosa Township.
Mahaska County, Iowa

Information was filed herein April 9th 1963, by Lawrence K. Winn for a warrant of arrest of No Warrent accusing defendant of the crime of Larceny Warrant issued on said day and placed in the hands of ...., Constable and return ..... 19....., Served by arresting said defendant, who was then arraigned, his rights stated, defendant pleads guilty. The defendant not being ready for trial, cause continued until ..... day of ..... 19.....

Defendant gave bail .....

Or Mittimus Issued

Now on this 10th day of April, 1963, trial proceeds:

(Magistrate will here insert full statement of further proceedings.)

The defendant entered a plea of Guilty, waived preliminary hearing. Appearance bond set at $1000.00. Not being able to furnish bond he was placed in custody of the Sheriff

COSTS		COSTS	
..... J. P.	$.....	State Witnesses	$.....
Inf. 1.00 War.....and docket 1.00	$ 2.00	.....	$.....
Continuance	$.....	.....	$.....
Bond	$.....	.....	$.....
Trial ..... Judgment.....	$ 1.00	.....	$.....
Transcript to	$.....	.....	$.....
Mittimus	$ 1.00	.....	$.....
Order	$.....	.....	$.....
.....	$.....	.....	$.....
Total	$ 4.00	Total	$.....

..... Const.	$.....	Defendant's Witnesses	$.....
Serving Warrant	$.....	.....	$.....
Mileage ..... on Warrants	$.....	.....	$.....
Attendance on Trial	$.....	.....	$.....
Serv. Subpoenas	$.....	.....	$.....
Mileage on Subpoenas	$.....	.....	$.....
Copies of Subpoenas	$.....	.....	$.....
Serving Mittimus on Conviction	$.....	.....	$.....
Serving	$.....	.....	$.....
Total	$.....	Total	$.....

JURY

.....

.....

.....

.....

.....

.....

.....

Transcript No. .....

[fol. 2]

STATE OF IOWA,)
) ss.
MAHASKA COUNTY,)

I, W. E. Miner, Justice of the Peace, in and for said County certify and on oath depose and say that the foregoing is a complete transcript of the proceedings of Docket No. 3 and Page No. 271 in said cause. That the costs herein mentioned are the true costs in said case or cases, and that in all cases herein transcripted where the costs are taxed to the defendant or defendants, the fees herein shown cannot be made from the persons liable to pay the same, and that none of the fees herein shown have ever been transcribed, except as herein noted, or paid by Mahaska County.

Oskaloosa, Iowa, April 10th, 1963.

/s/ W. E. MINER J. P.

Subscribed and sworn to before me this ..... day of ....., 19.....

....., Auditor

	Claimed	Allowed
J. P.	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Constable	$.....	$.....
Witness	$.....	$.....
Totals	$.....	$.....

The Auditor is hereby authorized to issue warrants in accordance with the above amounts as allowed ...., 19.....

....., Chairman

.....

.....

Board of Supervisors

[fol. 3]

IN THE DISTRICT COURT OF MAHASKA COUNTY, IOWA

THE STATE OF IOWA

vs.

LAWRENCE LONG

(State nature of offense in accordance with requirements of Chap. 773, Code)

INFORMATION—Filed April 22, 1963

Comes now Lake E. Crookham, as ..... County Attorney of Mahaska County, State of Iowa, and in the name and by the authority of the State of Iowa, accuses Lawrence Long of the crime of larceny committed as follows:

And charges that the said Lawrence Long, on or about the 9th day of April, A.D. 1963, in the County of Mahaska and State of Iowa, did take, steal and carry away certain goods and chattel, to wit:

One Pump

the property of Montgomery Ward & Co. Farm Store and of the value of more than $20.00. All contrary to law and in violation of Section 709.1 of the 1962 Code of Iowa.

/s/ LAKE E. CROOKHAM
Mahaska County Attorney

[fol. 4]

STATE OF IOWA, MAHASKA COUNTY, ss.

I, Lake E. Crookham, being duly sworn, do depose and say that I am ..... County Attorney of Mahaska County, Iowa; that I have made a full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing instrument are true as I verily believe.

/s/ LAKE E. CROOKHAM

Subscribed and sworn to by Lake E. Crookham, before me, the undersigned, this 22nd day of April, A.D. 1963.

(SEAL) /s/ CAROLINE E. CONNELL
Clerk of the District Court.

On this 22nd day of April, A.D. 1963, ... Judge of the District Court, being satisfied from the showing made herein that this cause should ..... be prosecuted by information, the same is approved.

/s/ R. G. YODER
Judge of the District Court.

This information, together with the minutes of the testimony relating thereto, is duly filed in the District Court, this 22nd day of April, A.D. 1963.

(SEAL) /s/ CAROLINE E. CONNELL
Clerk of the District Court of Mahaska County, State of Iowa.

By .....
Deputy Clerk.

Bail is hereby fixed on the within information in the sum of $2000.00.

/s/ R. G. YODER
Judge of District Court.
Clerk of District Court.

Sec. 769.2. FILING BY COUNTY ATTORNEY. The county attorney may, at any time when the grand jury is not actually in session, file in the district or municipal court either in term time or in vacation, an information charging a person with an indictable offense. In judicial districts within which a municipal court exists, the county attorney may at any time, whether or not the grand jury is in session, file an information in the district court charging a person with a misdemeanor.

Sec. 769.3. INDORSEMENT. Such information shall be indorsed, "a true information," which indorsement shall be signed by the county attorney.

Sec. 769.4. NAMES OF WITNESSES—MINUTES OF EVIDENCE. The county attorney shall, at the time of filing such information, indorse or cause to be indorsed thereon the names of the witnesses whose evidence he expects to introduce and use on the trial of the same, and shall also file with such information a minute of the evidence relating to the guilt of the accused of the offense charged of each witness whose name is so endorsed upon the information.

BILL OF PARTICULARS. Sec. 773.5 of the Code, provides that a bill of particulars may be filed by the county attorney, or may be required by the court, where the indictment and minutes of testimony fail to give the defendant sufficient information to enable him to prepare his defense.

INFORMATION

THE STATE OF IOWA

vs.

LAWRENCE LONG

A TRUE INFORMATION

LAKE E. CROOKHAM
County Attorney.

Names of Witnesses

Maynord Monson
Lawrence Wynn
Walter Burch
Amos Cummings

[fol. 5]

IN THE DISTRICT COURT OF
MAHASKA COUNTY, IOWA

1984—CD4—324

[Title Omitted]

(Recorded October 15, 1963)

MINUTE ENTRIES

Now, on this 14th day of October, 1963, this cause came on for hearing and trial pursuant to assignment, the State of Iowa appearing by Lake E. Crookham, the County Attorney of Mahaska County, Iowa, and the defendant appears in person and by his attorney, Harold B. Heslinga, and both parties announce they are now ready for trial.

The Jury is thereupon called and there came twelve (12) good and lawful voters who were drawn to serve as Petit Jurors for this Term of Court and who were impaneled and sworn according to law to well and truly try the issues herein and whose names are as follows, to-wit:

Alveta Boggess, Patsy Campbell, Elizabeth Deaver, Ferne Fellers, Opal Hicklin, Philip Hughes, Leatrice Killion, Martha Klinker, Lloyd Lester, Janet Poe, Lena Vander Wilt and Phyllis Versteeg.

After the Jury is impaneled and sworn according to law, opening statement on behalf of the State of Iowa is made. Opening statement on behalf of the defendant is made. Evidence on behalf of the State in introduced. Garold F. Heslinga enters his appearance on behalf of the defendant to assist defendant's counsel, Harold B. Heslinga, without compensation from the State of Iowa. State's evidence is continued and concluded. State rests. [fol. 6] And it is ordered by the Court that further hearing on said cause be and it is hereby continued until Tuesday, October 15, 1963, at nine o'clock A.M.

Hon. Harold J. Fleck, Judge Presiding
District Court Record 73, Page 428

[fol. 7]

IN THE DISTRICT COURT OF IOWA,
OF MAHASKA COUNTY IOWA

OCTOBER 1963 TERM

No. 1984

[Title Omitted]

VERDICT—Filed October 16, 1963

"We, the jury find the defendant, Lawrence Long, guilty of larceny and fix the value of the property taken at $25."

/s/ LLOYD LESTER
Foreman.

[fol. 8]

IN THE DISTRICT COURT OF IOWA
OF MAHASKA COUNTY, IOWA

OCTOBER 1963 TERM

No. 1984

[Title Omitted]

JUDGMENT ENTRY—October 21, 1963

Now, on this 21st day of October, 1963, a jury having returned a verdict finding the defendant guilty of larceny, at 8:15 p.m., October 16, 1963, and the defendant and his counsel having waived time to plead and requesting that sentence be delayed until this date, and it now being subsequent, the Court finds that sentence should now be pronounced:

ORDER OF COURT

IT IS THE ORDER AND JUDGMENT OF THE COURT, acting pursuant to the provisions of Section 709.1 of the 1962 Code of Iowa, that the defendant be confined in the State Penitentiary at Fort Madison, Iowa, for a period of not to exceed five years and pay the costs of prosecution.

Judgment accordingly. Mittimus to issue accordingly. Bond on appeal fixed at $2,000. To all of which the defendant excepts.

/s/ HAROLD J. FLECK
Judge, Sixth Judicial District of Iowa.

[fol. 9]

IN THE DISTRICT COURT OF MAHASKA COUNTY, IOWA

STATE OF IOWA

vs.

LAWRENCE LONG

Present: the Honorable Harold J. Fleck Judge of the Sixth Judicial District Walter O. Tharp, Sheriff and Caroline E. Connell, Clerk of said Court.

MITTIMUS—Filed October 24, 1963

The State of Iowa to the Sheriff of said County, Greeting:

Whereas, at a term of the District Court in and for said County, began and held at the Court House in the City of Oskaloosa in said County, on the 22nd day of April, A.D. 1963, Lawrence Long was informed against for the crime of larceny, and on the 16th day of October, A.D. 1963, said Lawrence Long was tried and convicted of the crime of larceny, and on the 21st day of October, A.D. 1963, was sentenced to be confined in the State Peni-

tentiary at Fort Madison in said State, for the term of not exceeding five (5) years from date of admittance, at hard labor, as appears to us of record and pay the costs of prosecution. Defendant sentenced under Section 709.1 of the 1962 Code of Iowa.

WE THEREFORE COMMAND YOU, that you take the body of the said Lawrence Long now confined in the jail of said County, and convey him to the State Penitentiary at Fort Madison in said State, therein to be confined in accordance with the sentence aforesaid; and we also command the Warden of the State Penitentiary at Fort Madison, Iowa, aforesaid to receive the body of the said Lawrence Long and him confine in the said State Penitentiary for the term of not exceeding five (5) years at hard labor, and for so doing this shall be his sufficient warrant.

Appeal Bond fixed at Two thousand & 00/100 ----- ($2,000.00) Dollars.

IN TESTIMONY WHEREOF, I, Caroline E. Connell Clerk of our District Court aforesaid, have hereunto set my hand and affixed the seal of said Court, this 22nd day of October, A.D. 1963.

CAROLINE E. CONNELL
Clerk.

By /s/ VERA M. MINENGA
Deputy.

* * * *

[fol. 10]

[RECEIPT OF WARDEN FOR PRISONER
Omitted in printing]

[RETURN OF SHERIFF Omitted in printing]

* * * *

[fol. 11]

IN THE DISTRICT COURT OF IOWA
IN AND FOR LEE COUNTY,
FORT MADISON, IOWA

* * * *

[File Endorsement Omitted]

LAWRENCE LONG, PLAINTIFF

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa, DEFENDANT

APPLICATION FOR LEAVE TO FILE PETITION FOR HABEAS CORPUS IN FORMA PAUPERIS, AND FOR APPOINTMENT OF COUNSEL—filed January 13, 1965

* * * *

Comes now Lawrence Long, plaintiff named in the above entitled cause, being first duly sworn upon Oath, makes this his application to this Honorable Court, for Leave to File and Proceed with my hereto attached and following Petition For Writ Of Habeas Corpus in Forma Pauperis.

And further respectfully request this Court to appoint Competent Legal Counsel to adequately present said petition, and to protect my Constitutional RIGHTS on the Premises.

As good cause herein I do aver and state the following.

JURISDICTIONAL STATEMENT

Jurisdiction in this case is found upon statute and RIGHT; the 1962 Code of Iowa in Section 663.4, 663.5, makes the Court's Jurisdiction POSITIVE and MANDATORY; I sincerely believe I am restrained of my liberty by the above named defendant in violation of my Constitutional RIGHTS as secured by the 5th and 14th Amendments to the United States Constitution.

I make this application for writ of habeas corpus in declaration of poverty as an included AFFIDAVIT in

good faith for the purpose of securing redress to which I believe I am entitled to as a Citizen of the United States, Affidavit of Poverty attached hereto and made a part of this reference thereto.

BRIEF POINTS AND AUTHORITIES

The RIGHT of an individual to relief for an illegal and unlawful restraint or imprisonment by the Writ of Habeas Corpus, shall not be precluded by poverty, or lack of funds, not shall the Writ of Habeas Corpus be suspended.

Citing: Smith vs. Bennett, 81 S.Ct. 895 (1961) as provided under the provision of the United States Constitution, Section 9, Article 1, thereof.

[fol. 12]

BRIEF POINTS AND AUTHORITIES

It is the duty of the Trial Judge in Habeas Corpus Proceedings to appoint competent Legal Counsel to represent persons unable to employ Counsel because of poverty, to represent petitioner in all stages of POST-CONVICTION LEGAL PROCEEDINGS cognizable as a collateral attack upon a sentence of imprisonment, to insure that indigents are not precluded from judicial remedy by their poverty, and that justice shall not wear a dollar sugn in these United States.

See: *Lane* vs. *Brown*, 83 S.Ct. 768 (1963)
Draper vs. *State of Washington*, 83 S.Ct. 774 (1963).

The United States Constitution, Article 1, Section 9, the RIGHT to petition for habeas corpus, Amendment 5, due process of law guarantee. Amendment 14, due process and equal protection of the laws in all—judicial proceedings.

> Opportunity for rdress against detention in violation of fundamental liberties of person, safegard against State action by Federal Constitution, though such opportunity presuppose opportunity to be heard, to

argue and present veidence *MUST NEVER* be totally foreclosed.

See: Towndend vs. Sain, 83 S.Ct. 745, (1963).

Federal Court on habeas corpus must hold evidence hearing if application *did not receive full and fair evidentiary hearing in STATE COURT*, either at time of trial or in calloteral proceedings.

See: Townsend vs. Sain, 83 S.Ct. 745, (1963)

CERTIFICATE OF APPLICANT

I, Lawrence Long, depose, state and aver upon Oath that all statements and representations made and contained in my foregoing Application for Leave to Proceed in Forma Pauperis and Application for Appointment of Counsel are true and correct to the best of my knowledge and belief.

WHEREFORE: I pary this Honorable Court to grant me Leave to Proceed in Forma Pauperis, and to issue an ORDER commanding a full, fair and impartial EVIDENTIARY HEARING before this Court.

STATE OF IOWA)
(SS
COUNTY LF LEE)

Dated this 11 day of January, 1965

/s/ Lawrence Long
LAWRENCE LONG, #28411, Plaintiff,
Box 316, Fort Madison, Iowa.

Subscribed and sworn to before me in my office at Fort Madison, Iowa, by the above named Lawrence Long, this 11 day of January, 1965.

/s/ Ralph D. Moehn
Notary Public in and for
Lee County, Iowa
at Fort Madison, Iowa.

My Commission expires July 4th, 1966.

[fol. 13]

IN THE DISTRICT COURT OF IOWA
IN AND FOR LEE COUNTY,
FORT MADISON, IOWA

* * * *

[File Endorsement Omitted]

[Title Omitted]

AFFIDAVIT OF POVERTY—filed January 13, 1965

* * * *

Herein I, Lawrence Long, Plaintiff in the above entitled cause, being first duly sworn, depose and state upon Oath, that I am a Citizen of the United States by birthright; I am of legal age; and I am otherwise qualified to make this AFFIDAVIT.

I am a "Pauper"; I am without funds or means to obtain funds; I have not dispose of any property to so pauperize myself, nor do I posess property. I am unable to pay fees or cost in connection with the filing of my Petition For A Writ Of Habeas Corpus, and I am unable to give security for such cost.

I make this AFFIDAVIT in good faith, for the purpose of the securing of JUSTICE and DUE PROCESS OF LAW and EQUAL PROTECTION OF THE LAWS under the provisions of the State and Federal Constitutions to which I believe I am entitled to as a Citizen of the United States.

All statements contained herein are true and correct to the best of my knowledge and belief.

STATE OF IOWA)
(SS.
COUNTY OF LEE)

/s/ Lawrence Long
LAWRENCE LONG, #28411,
Box 316, Fort Madison, Iowa,
Plaintiff.

Subscribed and sworn to before me in my office at Fort Madison, Iowa, by the above named Lawrence Long, this 11 day of January A.D., 1965.

/s/ Ralph D. Moehn
Notary Public in and for
Lee County, Iowa
at Fort Madison, Iowa.

My Commission expires July 4th, 1966.

[fol. 15]

IN THE DISTRICT COURT OF IOWA
IN AND FOR LEE COUNTY,
FORT MADISON, IOWA

* * * *

[Title Omitted]

PETITION FOR A WRIT OF HABEAS CORPUS—
filed January 13, 1965

Comes now Lawrence Long, plaintiff above named and first being duly sworn upon Oath, makes application to this Honorable Court for a Writ of Habeas Corpus commanding the above named defendant to release him from further imprisonment and all restraint, and a cause therefore your plaintiff-petitioner herein deposes, states and avers:

-1-

That your petitioner is illegally, unlawfully, and un-Constitutional restrained of his liberty, and imprisoned within the premises of the Iowa State Penitentiary, at Fort Madison, Iowa.

-2-

That to your petitioner's best knowledge and belief the cause of said restraint is a MITTIMUS issued by the District Court of Iowa, in and for Mahaska County, Iowa, at Oskaloosa, Iowa, entered on the 22nd day of April, 1963, in the cause of Criminal No. 1984-CD4-324, recorded on October 15th, 1963, being a County Attorney's Information.

-3-

Your petitioner was tried before Court and Jury on a County Attorney's Information charging him with larcent of a pump, in violation of Section 709.1 of the 1962 Code of Iowa. The Jury found your petitioner guilty and the Court sentenced petitioner to an indeterminate term not to exceed five years in the Iowa State Penitentiary at Fort Madison, Iowa. Petitioner Appeal his conviction to the Iowa State Supreme Court, and the Court Affirmed said conviction.

-4-

Your Petitioner's imprisonment is illegal and un-Constitutional, whereas:

(a) Prior to petitioner's appearance before his criminal trial court he was subjected to jeopardy by being placed in the County Jail for a prior of six months before being [fol. 16] brought to trial, and was DENIED the RIGHT to the assistance of Counsel at the time of his preliminary hearing, wherein we find that the guiding hand of counsel is essential to advise petitioner of his rights, and this was the stage when legal aid and advice was MOST CRITICAL to petitioner, what happened at the preliminary hearing in this instant case could have certainly affected the whole trial had your petitioner had the good faith and assistance of counsel at the time of his interrogation and during the preliminary hearing.

-5-

The critical question in this case is whether, under the circumstance, the refusal by the police to honor peti-

tioner's request to consult with his attorney during the course of an interrogation constitutes a DENIAL of the "Assistance of Counsel" in violation of Sixth Amendment to the Constitution of the United States as "made—obligatory upon the States by the Fourteenth Amendment to the United States Constitution, at all stages of the proceedings, and thereby renders inadmissible in state criminal trial any incriminating statements elicited by the police during the interrogation of petitioner wherein your petitioner may have stated that he was guilty when in fact he was not aware of the fact and charge that he was being questioned about, and therefore incriminating himself without due process of law. The right to counsel is afforded for the purpose of aiding the accused for all practical purposes.

-6-

Your Petitioner's Court-Appointed Attorney was incompetent to an extent causing petitioner (the then Defendant) to be as without counsel in his criminal trial due to lack of time said Attorney had to prepare petitioner's defense, and said Attorney's unwillingness to fight for your petitioner's RIGHT to a FAIR AND JUST APPEAL submitted to the Iowa State Supreme Court. No Brief and Argument was submitted to the said Supreme Court upon petitioner's Appeal, The right of an effective appeal to the State Supreme Court in a Constitutional RIGHT, conferred by law, and is on which all eligible persons are entitled to exerise, free from arbitrary or discrimination, and when an accused is denied the right to a fair and just hearing before the hight Court of the State because his Court-Appointed Attorney failed to or refused to present an effective Appeal to the high Court, then the accused is DENIED a fair and impartial review of his conviction which action on the part of his Attorney denies petitioner a just and fair determination of his imprisonment. And such a miscarriage of—bringing petitioner's Appeal to the Supreme without submitting any brief and argument, is a foreclosure of his Constitutional RIGHT to a fair and effective appeal, and may therefore become objectionable under both

either the equal protection or due process provisions of the —Fourteenth Amenmdnt, or the due process provisions of the Fifth Amendment all under the provisions of the 14th Amendment to the United States.

[fol. 17] AUTHORITY IN BRIEF

If an Appeal, attempted appeal, or the receipt of the same initial benefit looking toward prefecting of an effective appeal to the high court of the State becomes altered or the appeal is in any way not effective by thr act of the appellant's Counsel in submitting an appeal, and the appellant is sunsstantial PREJUDICE and appellant on his appeal suffered an unjust decision rendered by the Supreme Court of that State in State hearing the appeal, in connection therewith through some wrongful conduct of the appellant's Court Appointed Counsel, the appellant may then become entitled to a hearing in Habeas Corpus Proceedings and appropriate relief, if not an unqualified discharged from an illegal and un-Constitutional imprisonment.

See: Ex-Parte Mattews, 49 S.W. 623—America Law Reports, United States Annotated Code, 19 A.L.R. 2d 789.

Choice made by State prisoner's Counsel and partifipated in by State prisoner does not automatically BAR State prisoner's RIGHT to relief in Habeas Corpus Proceedings in Federal District Court or ground of forfeiture of prisoner's remedies.

See: Title 28 U.S.C.A. Sec. 2241 et seq—Id.

-7-

The circumstances surrounding my prosecution are such as to deprive me of Due Process of Law and Equal Protection of the Laws, the RIGHT to a Fair and Impartial Criminal Trial as is GUARANTEED by the provisions of the United States Constitution.

Your Petitioner's admission of guilt during his preliminary hearing (without the aid of Counsel) was entred into evidence at your petitioner's criminal trial and was

prejudicial against your petitioner at his criminal trial. See: Brief Point 8 attached to petitioner's petition for a writ of habeas corpus and make a part hereof by this reference.

-8-

Thus considering the recent decisions of the United States Supreme Court, which in this case petitioner did not have the assistance of counsel to represent him at his preliminary hearing as is required by law inorder to defend your petitioner's Constitutional RIGHTS.

At the hearing your petitioner requested the service of an Attorney BUT this was denied because the State of Iowa refused to recognize the mandates of the Supreme Court of the United States, and the Federal Constitution. Your petitioner was mentally incompetent in the fullest legal sense at the time of his preliminary hearing as the result of severe depression caused by alocohal, pus sustained brain washing in persuasion of guilt, and under police guise was subject to the fullest denial of due process at his said preliminary hearing.

[fol. 18] (9)

The fundamental justice inherent in due process allways compelled the conclusion that an indigent defendant has an unqualified RIGHT to the assistance of Counsel as all stages of the proceedings and this includes the RIGHT to Counsel at his preliminary hearing.

IN AN OPINION OF THE ATTORNEY GENERAL OF IOWA (Hultman) on October 5, 1964 said. "In Iowa, while it is not the normal function of a magistrate at preliminary hearing to receive pleas of guilty, such a plea if made at preliminary hearing may be intorduced at trial as admission of guilt. An Iowa preliminary hearing then may be just as critical a stage as the Maryland preliminary hearing in—*White* vs. *Maryland* supra. IT IS THEREFORE OUR OPINION THAT A MAGISTRATE IN IOWA HAS A CONSTITUTIONAL DUTY TO APPOINT COUNSEL FOR AN INDEGENT DEFENDANT AT PRELIMINARY HEARING.

In Johnson vs. Zerbet, Warden, 1937, 304 U.S. 358, 58 S.Ct. 1019, 1024, 82 L.Ed. 1461, 146 A.L.R. 357,

the Supreme Court said", "If the accused, however, is not represented by Counsel and has not competently and intelligently waived his—Constitutional RIGHT, the Sixth Amendment stands as a Jurisdictional BAR to a valid conviction and sentence depriving him of his life or his liberty.

(10)

Prosecting Attorney's that refuse to believe in their Oath of Office, their Oath to uphold the Laws and Constitutions of both State and Federal acting in violation of the due process of law.

The Courts of this land are aware of the fact and evidently the Legislature of Iowa did recognize this condition, or else there would have been no need to establish another law demanding that an accused be represented by Counsel at all stages of criminal proceedings. Because as of date the Law and Constitutions are not worth the paper they are written on if the RIGHTS GUARANTEED to the Citizens of the United States are not granted to them by these in power in this country and there have been too many Prosecuting Attorneys that fail to recognize there RIGHTS. Under these circumstances the Legislature and Government Departments were forced to pass a mandate to protect the RIGHTS of the people. This is a serious condition to exist in our country, while the basis of our government is the proposition that all men were created free and equal, and guaranteed equal protection, due process and JUSTICE, the equal protection and advice of Counsel, and yet these RIGHTS are withheld in a country that is based on the Ideals ot TRUTH, HONESTY AMD JUSTICE TO ALL.

BRIEF POINTS AND AUTHORITIES

". . Nor shall any State deprive any person of life, libtry, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of thelaws".

UNITED STATES CONSTITUTION, Amend, 14 Sec. 1.

[fol. 19] ". . . . . no person shall be deprive of life, linerty, or property, without due process of law."

CONSTITUTION OF THE STATE OF IOWA, Sec. 1.

"Denial of due process of law is a jurisdictional question which may be raised on habeas corpus, amd any infringment of constitutional RIGHTS of those accused of crime MSUT be considered a denial of due process of law.

SEWELL VS. LAONSON, Iowa 1953, 57 N.W. 2d 556.

". . . nor shall any person be subject for the same offense to be twice put in *jeopardy* of life or limb; . . . .

UNITED STATES CONSTITUTION, Amend. 5.

"No person shall be twice placed in jeopardy for the same offense."

REEN VS. UNITED STATES, 76 S.Ct. 497.

"IT IS NOT THE VERDICT OR JUDGMENT WHICH PLACES A PRISONER IN JEOPARDY: IF A COURT PROCEEDS ILLEGALLY AFTER A PRISONER HAD BEEN PLACED IN JEOPARDY, IT'S ILLEGAL ACT CANNOT NULLIFY THE JEOPARDY: IF IT DID, THEN THE PROCESS MIGHT BE REPEATED FOREVER, AND THE CONSTITUTIONAL GUARANTY BE RENDERED VOID."

1. BISHOP OF CRIMINAL LAW p-772, #1045.

"All persons accused of crimes MUST stand on an equality before the BAR OF JUSTICE."

GRIFFIN VS, PEOPLE OF STATE OF ILL., 1956, 76 S.Ct. 585.

"Under the DUE PTOCESS clause of U.S.C.A., Const., Amend. 14, a State prosecution cannot be brought about by methods that offend a sense of JUSTICE."

ROCHIN VS. PEOPLE OF CAL. 72 S.Ct. 745, 205.

"There are procedural errors so grave as to require appropriate federal court order directing habeas corpus applicant's release unless State provides remedy.

TOWNSEND VS. SAIN, 83 S.Ct. 745.

"Where provisions of Bill of Rights of Federal Constitution is fundamental and essential to fair trial, it is made a full obligation on State Court, by the Fourteenth Amendment.

GIDEON VS. WAINRIGHT, 83 S.Ct. 792.

"Sixth Amendment of Federal Constitution providing that in all criminal prosecution the accused shall enjoy the RIGHT to the FULL ASSISTANCE of COUNSEL (at all stages of his proceedings) for his defense is made obligatory on the States by the Fourteenth Amendment, and indigent defendant in criminal prosecution in State Court has a RIGHT to have COUNSEL APPOINTED for him at all stages of proceedings including preliminary hearing.

GIDEON vs. WAINWRIGHT, 83 S.Ct. 792.

"Assistance of Counsel in criminal prosecution means that accused is entitled to the GOOD-FAITH, AND EFFECTIVE ASSISTANCE of COMPETENT LEGAL COUNSEL IN MAKING HIS DEFENSE.

HAWK vs. OLSON, Neb. 1945, 66 S.Ct. 116.

"Due Porcess denied in proceedings leading to conviction is not restored just because State Court declines to Adjudicate the claimed denial on the MERITS.

FAY vs. NOIA, 83, S.Ct. 822.

[fol. 20] "If a Law is so applied and administered as to make unjust discrimination between persons in similar circumstances material to their RIGHTS, such a DENIAL of equal justice violates "due process of Law".

HOWARD SPORTS DAILY vs. WELLER, 1941, 18 A. 2d 210, 179 Md. 335, United States Code Annotated.

"Due Process of Law" is a law which hears before it condemands, which proceeds upon inquiry and redress, and renders judgment *ONLY* afterwards, and such due process of law is required both by Federal and State Constitutions.

CANTU vs. PARR, Tex Cir., App. 1960, 338 S.W. 2d 182. United States Code Annotated.

"MERE PERFUNCTORY PERFORMANCE BY COUNSEL DOES NOT SATISFY THE CONSTITUTIONAL REQUIREMENTS THAT ACCUSED SHALL HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL.

REECE vs. STATE OF GA. 1955, 76 S.Ct. 167.

"Due Process of Law "The due process of law provisions of the 5th and 14th Amendments GUARANTESS TO EVERY PERSON HIS DAY IN COURT, ans reasonable opportunity to be heard or defend, and it requires orderly proceedings in competent tribunal in accordance with general established rules not violative of fundamental RIGHTS.

ROSENBLUM vs. ROSENBLUM, 1943, 42 N.Y.S. 2d 626, 181; Misc. 78, United States Code Annotated.

"UNDER CONSTITUTIONAL PROVISIONS, COURTS OF JUSTICE OF THE STATE SHOULD BE OPEN TO EVERY PERSON AND SPEEDY AND CERTAIN REMEDY BE AFFORDED FOR EVERY WRONG, AND RIGHT OF JUSTICE SHALL BE ADMINISTERED WITHOUT FAIL, DENIAL, DELAY, OR PREDUICE, AND CONSTRUED TO MEAN THAT A PERSON CONVICTED OF A CRIME HAS A CONSTITUTIONAL RIGHT.

AMERICA LAW REPORTS, Annotated, 19 A.L.R. 2d 789.

"Once a State chooses to establish appellant review in Criminal Cases, the Equal Protection of the Fourteenth (14) Amendment requires that the State NOT FORECLOSE INDIGENTS from access to any phase of that procedding, or of any phase of that procedure because of their poverty and such principle is not to be limited to direct appeal from criminal conviction but extends alike to State POST-CONVICTION PROCEEDINGS" Citing SMITH vs. BENNETT, 356 U.S. 708, 81 S.Ct. 895, 6-L Ed. 2-39.

See: Lans vs. Brown, 83 S.Ct. 768.

IF NO EXPRESS FINDING OF FACT HAVE BEEN MADE BY STATE COURT, FEDERAL DISTRICT COURT ON HABEAS CORPUS MUST INITIALLY DETERMINE WHETHER STATE COURT IMPLIEDLY FOUND MATERIAL FACTS; AND NO RELEVANT FINDINGS WERE MADE UNLESS STATE COURT DECIDED ON THE MERITS OF THE—CONSTITUTIONAL CLAIM TENDERED BY DEFENDANT.

TOWNSEND vs. SAIN, 83 S.Ct. 745.

[fol. 21] ARGUMENT

The first ground pleaded your petitioner as good and sufficient cause for his release by the Writ of Habeas Corpus, is that prior to the criminal trial proceedings resulting in his conviction and his imprisonment, your petitioner placed in cinfinement within the County Jail at Oskaloosa, Iowa, in the County of Mahaska Iowa, for priod of six months, being denied a sppedy trial, and denied the right to the aid and assistance of Counsel when in fact your petitioner requested Counsel upon his arrest.

That when your petitioner was taken to Court on his preliminary hearing he was again denied the right to the aid of Counsel, and that that petitioner was tricked into making a statement, which was used against him at his criminal trail. Petitioner did not have Counsel—appointed to him in time for his Court-Appointed Attorney to effectively perpare a defense for him.

Your petitioner's Court-Appointed Attorney did not submit any brief and argument to the Iowa State Supreme Court upon appeal. The only evidence that was before the Supreme Court was on Clerk's transcript, And the competence of petitioner's Court-Appointed Attorney is challenged as your Petitioner's third ground for relief from his illegal and un-Constitutional imprisonment by the Writ of Habease Corpus, and the question of competence here goes only to said Court-Appointed Attorney's conduct and action in representation of petitioner in his criminal trial and on the action of his Counsel's failure to submit a full and fair evidentiary argument to the Supreme Court on appeal. Petitioner contends that the demeanor and outcome of said criminal proceedings clearly show incompetence by his Court-Appointed Attorney, in that the said Attorney refused to and failed to submit the case to the Supreme Court of Iowa in proper manner, in that the said Attorney accepted the guilty conviction by his criminal trial court; by said Attorney's failure to question the criminal trial Court's JURISDICTION to try petitioner brought to trial six months after his arrest for a crime that under condition should have not been more than a misdemeanor charge

The legal requirements that an individual forced to defend himself in a Court of Law upon his preliminary hearing on a criminal charge, shall be afforded Counsel in making his defense, includes ther erquirment that said Attorney or Counsel shall be competent, and give the accused his good faithfully assistance, and your petitioner contends that he was as without Counsel in his Criminal Trial as described in the foregoing part of this argument. [fol. 22] As your petitioner's final grounds for his release, petitioner pleads that at the time of criminal preliminary hearing which proceedings resulted in his being brought to criminal trial Court, he was wholly incompetent to stand trial; that at said time his mental condition and status as the defendant; and that he at the said time in no condition to stand trial, that his mental condition was in such a state that he could not resist suggestion.

Surely this condition and situation violates the basic principle and concept of justice, and cannot be condoned

or allowed to stand as precedent; for where lies the need and purpose of trials and courts when an emotionally and mentally disturbed prisoner can be subjected to tratment which could only aggravate his condition, and it was upon petitioner's criminal trial court piously rendered judgment of sentence against him, knowing at that time, that your petitioner was without—congizance of consequences, or even the reality of his criminal trial; is this due process and equal protection of the laws which we in the United States claim with GREAT PRIDE ???? *No most certainly NOT*, this dose not even resemble JUSTICE, or a fair and impartial legal trial, and this is wholly repugnant to the Constitutions of both State and Federal Law.

This situation and condition is resultant of officials of the State of Iowa acting without consideration of the laws, or Constitutions of the United States and the State of Iowa, who apparently believe that the Constitutional GUARANTEE or Personal Liberty is only for themselves and their friends. Petitioner urges this Honorable Court carefully consider and weigh the consequences of uncontroled behaviour of law enforcement and juricial offiicals in the manner argued against here, and strick down this practice by issuance of the Writ paryed, that it may be known that the RIGHTS, PRIVILEGES AND IMMUNITIES OF CITIZENS will be upheld in the State of Iowa without respect of person or politic.

Your petitioner submits that he is entitled to his release by the Writ of Habeas Corpus on the basis of his Constitutional RIGHTS which his judgment of sentence was rendered without DUE PROCESS OF LAW OR THE THE RIGHT EQUAL PROTECTION OF THE LAWS.

In summary your petitioner respectfully submits that he is entitled to the relief prayed herein; that each point of argument constitutes a seperate ground violate of petitioner's State and Federal RIGHTS to due process ans equal protection of the lawm which taken singly are sufficient MERIT to warrant the issuance of the writ prayed; and that together these grounds constitute a TOTAL VIOLATION of petitioner's right to due process of the law in his criminal trial, and equal protection of

the laws in this action to an extent vitating his criminal trial Court's JURISDICTION, and leaving its JUDGMENT of sentence against your petitioner VOIDABLE by the GREAT WRIT.

[fol. 23] IN CONCLUSION

WHEREFORE PETITIONER PRAYS the writ of habeas corpus issue and that this Court bring this cause for hearing, and that this cause be set for immediate trial after the appointment of theretofore requested; and that following an evidentiary hearing on the MERITS of the Constitutional Question raised herein, this application be sustained and petitioner be released from further imprisonment and restraint as law and justice demands.

I, Lawrence Long, being the plaintiff-petitioner herein depose and state upon Oath, that all assertions of fact and all statements contained herein are true and correct as I verily believe.

Dated this 11 day of January, 1965.

Respectfully submitted.

/s/ Lawrence Long
LAWRENCE LONG, 28411,
Box 316, Fort Madison, Iowa,
Plaintiff-Petitioner.

STATE OF IOWA)
(SS.
COUNTY OF LEE)

Subscribed and sworn to before me in my office at Fort Madison, Iowa, by the above named Lawrence Long, this 11 day of January 1965.

/s/ Ralph D. Moehn
Notary Public in and for
Lee County, Iowa
at Fort Madison, Iowa.

My Commission expires July 4th, 1966.

[fol. 24]

IN THE DISTRICT COURT OF IOWA,
IN AND FOR LEE COUNTY, FORT MADISON

Case No. 13943

[File Endorsement Omitted]

[Title Omitted]

ORDER DATED JANUARY 18, 1965, GRANTING AN EVIDENTIARY HEARING TO BE COMMENCED ON JANUARY 29, 1965

This matter comes before the Court upon a petition for writ of habeas corpus filed by the plaintiff, Lawrence Long, on January 13, 1965. The plaintiff alleges that he is a pauper, and seeks to be relieved of paying the usual filing fee.

The Court having examined the petition, finds that the writ should be issued.

IT IS THEREFORE HEREBY ORDERED that the plaintiff may proceed without the usual payment of costs, and IT IS FURTHER ORDERED that the writ of habeas corpus issue.

IT IS FURTHER ORDERED that the writ of habeas corpus is returnable on the 29th day of January, 1965, at 11:00 A.M. in the courtroom of the Lee County Courthouse at Fort Madison, Iowa. The Clerk is further ordered to notify the proper parties as provided by law.

Dated this 18th day of January, A.D., 1965.

/s/ W. L. Huiskamp
Judge of District Court
First Judicial District

[fol. 25]

IN THE DISTICT COURT OF THE STATE OF IOWA
IN AND FOR LEE COUNTY, FORT MADISON, IOWA

Case No. 13943

[File Endorsement Omitted]

[Title Omitted]

ANSWER OF DEFENDANT, JOHN E. BENNETT WARDEN ETC.—filed January 29, 1965

Comes now John E. Bennett, Defendant herein, by his attorneys, Johnson, Phelan & Tucker, in answer to Plaintiff's petition and states as follows:

1. Defendant denies paragraphs 1, 4, 5, 6, 7 and 8.
2. Defendant admits paragraph 2 of Plaintiff's petition with regard to his having been convicted in Mahaska County although does not admit the exact dates or sentence, said facts to be verified and confirmed at the trial of the case.
3. Defendant denies paragraph 3 by reason of lack of information and belief.
4. Defendant denies paragraphs 9 and 10 for the reason that they are not allegations of ultimate fact but are more in the nature of an argument making it impossible to plead thereto.

Wherefore, Defendant prays the Court to dismiss Plaintiff's petition at Plaintiff's costs and to remand the petitioner to the custody of the Defendant.

/s/ Thomas E. Tucker
JOHNSON, PHELAN & TUCKER

[fol. 26]

IN THE DISTRICT COURT OF IOWA,
IN AND FOR LEE COUNTY, FORT MADISON

Case No. 13943

[File Endorsement Omitted]

[Title Omitted]

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS—February 20, 1965

This matter comes before the Court upon a petition for a writ of habeas corpus filed January 13, 1965. The matter was set for hearing on January 29, 1965, at which time testimony was received. The Court finds that the plaintiff raises the following contentions:

1. That he was confined six months in jail before being brought to trial.
2. That he was denied the assistance of counsel at the time of his preliminary hearing.
3. That he was refused by the police the right to consult his attorney at times during his confinement in the jail and during his interrogation.
4. That his court-appointed attorney was incompetent.
5. That the plaintiff was incompetent at the time of his preliminary hearing because of severe depression caused by alcohol plus sustained brainwashing.

The Court finds that the plaintiff's contention No. 1, that he was confined six months in jail prior to being brought to trial was determined by the Iowa Supreme Court against this plaintiff in the case of State vs. Long, 130 N.W. 2nd, 663. The Court further finds that as to Objection No. 2, that he was denied counsel at the time of the preliminary hearing, the County Attorney, Lake E. Crookham, contacted the attorney for the then defendant, Patrick Life, and said attorney advised that he would not be present, and informed the County Attorney that he [fol. 27] would waive the defendant to the Grand Jury, and waived a preliminary hearing. The Court finds that no rights were lost at this time, and that he was actually

represented, and the Iowa Supreme Court found in the case of State vs. Long, 130 N.W. 2nd, 663: "He was at all times represented by counsel."

The Court further finds in regard to Objection No. 3 that the plaintiff has failed in his proof that the police refused to permit him to contact his attorney. The evidence shows that he contacted his attorney on numerous occasions throughout his confinement.

In regard to Objection No. 4, the Court finds that the plaintiff was represented by Patrick Life and by Heslinga and Heslinga, attorneys at law, both of whom the Court finds are competent.

The Court further finds in regard to Objection No. 5 that there was no competent evidence submitted at the hearing to show that the plaintiff, Lawrence Long, was incompetent for any reason at any time during the confinement.

For the reasons above set forth, IT IS THEREFORE HEREBY ORDERED that the application for writ of habeas corpus is denied.

Dated this 20th day of February, A.D., 1965.

/s/ W. L. Huiskamp
Judge of District Court
First Judicial District

[fol. 28]

IN THE DISTRICT COURT OF IOWA,
IN AND FOR LEE COUNTY, FORT MADISON, IOWA

Case No. 13943

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—filed March 17, 1965

TO THE ABOVE NAMED DEFENDANT:

Notice is hereby given that Lawrence Long, plaintiff above named, hereby appeals to the Supreme Court of Iowa from the order of the Honorable W. L. Huiskamp denying a petition for writ of habeas corpus.

Such order was entered in this action on the 20th day of February, 1965, and is on file with the Clerk of the District Court at Fort Madison, Iowa.

/s/ Lawrence Long
LAWRENCE LONG
28411
Box 316
Fort Madison, Iowa

[fol. 29]

IN THE DISTRICT COURT OF IOWA,
WITHIN AND FOR LEE COUNTY, FORT MADISON

* * * *

Case No. 13943

[Title Omitted]

APPLICATION FOR APPOINTMENT OF COUNSEL TO PROSECUTE AN APPEAL—filed March 23, 1965

Comes now Lawrence Long, plaintiff in the above entitled cause, making application for appointment of counsel to prosecute an appeal to the Supreme Court of Iowa from the order entered in such cause on the 19th day of February, 1965, and states the following:

1. That plaintiff was granted an evidentiary hearing on his petiiton for writ of habeas corpus but was required to prosecute his action himself due to his lack of funds with which to retain professional counsel and the Courts refusal to appoint counsel although faced with such evidence.

2. That the appointment of counsel is necessary to effectively prosecute a full fledged appeal to the Supreme Court of Iowa, and plaintiff being a pauper and proceeding as such is without funds or means to retain or employ counsel to represent him in appellate proceedings.

Wherefore, plaintiff respectfully requests that counsel be appointed to represent him in appellate proceedings under authority of *Douglas* v. *People of State of California*, 83 S.Ct. 814 (1963), notwithstanding the absence of state statute therefor.

Respectfully submitted,

/s/ Lawrence Long
LAWRENCE LONG
28411
Box 316
Fort Madison, Iowa
Plaintiff

[fol. 30]

IN THE DISTRICT COURT OF IOWA,
IN AND FOR LEE COUNTY, FORT MADISON

Civil No. 13943

[File Endorsement Omitted]

[Title Omitted]

APPLICATION FOR COURT REPORTER'S TRANSCRIPT OF THE PROCEEDINGS HAD IN HABEAS CORPUS WITHOUT PAYMENT OF FEES OR COSTS—filed March 23, 1965

Comes now Lawrence Long, plaintiff-appellant in the above entitled cause and makes application to this Honorable Court for a certified copy of the Official Court Reporter's Transcript of the proceedings had in such cause without payment of fees or costs.

Plaintiff has duly perfected an appeal to the Supreme Court of Iowa in the above entitled post-conviction proceedings and such transcript is necessary to prepare an adequate record with which to prosecute an effective appeal to the Supreme Court of Iowa.

I verily believe I am entitled to such transcript under recent mandates of the Supreme Court of the United States wherein it is stated:

> Once a state chooses to establish appellate review in criminal cases, the equal protection clause of the 14th amendment requires that the state not foreclose indigents from access to any phase of that procedure solely because of their poverty and such principle is not to be limited to direct appeals from criminal convictions but extends alike to state post-conviction proceedings.
>
> Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768 9 L.ED. 2d, 892 (1963)
>
> In regard to a states grant of a right to test detention of prisoners, the 14th amendment weighs interest of rich and poor criminals in equal scale and its hand extends as far to each.
>
> Smith v. Bennett, 81 S.Ct. 895, (1961)

[fol. 31] To interpose any financial consideration between an indigent prisoner of a state and his exercise of a state right to sue for his liberty is to deny that prisoner equal protection of the laws.

Smith v. Bennett, 81 S.Ct. 895, (1961)

Habeas corpus is the highest remedy in law for any man imprisoned and its availability to regain liberty lost through criminal process cannot be made contigent upon choice of criminal or civil label for the writ.

Smith v. Bennett, 81 S.Ct. 895, (1961)

For the reasons stated herein, I respectfully request this court enter an order which will permit be to obtain a copy of said transcript which is so vital to obtaining the adequate appellate review I seek.

Herein I, Lawrence Long, being first duly sworn, depose and state that all the foregoing statements are true and correct to the best of my knowledge and belief.

Respectfully submitted,

/s/ Lawrence
LAWRENCE LONG
28411 Box 316
Fort Madison, Iowa

STATE OF IOWA)
(ss.
COUNTY OF LEE)

Subscribed and sworn to before me in my office at Fort Madison, Ia., by the above named Lawrence Long, this 22 day of March, 1965

/s/ Ralph D. Moehn
Notary Public
in and for Lee County

My commission expires July 4, 1966.

[fol. 32]

IN THE DISTRICT COURT OF IOWA,
IN AND FOR LEE COUNTY, FORT MADISON

Case No. 13943

[File Endorsement Omitted]

[Title Omitted]

ORDER DENYING PLAINTIFF'S APPLICATION FOR TRANSCRIPT AND APPOINTMENT OF COUNSEL—
March 23, 1965

Plaintiff has filed notice of appeal from the ruling of this Court of February 20, 1965, and has requested that he be furnished a copy of the transcript without the payment of the necessary fees, and further that counsel be appointed for him to assist him in the prosecution of his appeal.

Habeas corpus being a civil action there is no provision in the law for the furnishing of a transcript without the payment of fee, or for the appointment of counsel.

IT IS THEREFORE ORDERED AND DECREED THAT the plaintiff's application for transcript and appointment of counsel be and the same is hereby denied.

Dated this 23rd day of March, 1965.

/s/ J. R. Leary
Judge of the District Court
First Judicial District.

[fol. 33]

IN THE SUPREME COURT OF THE STATE OF IOWA

General No. ——

[File Endorsement, Omitted]

LAWRENCE LONG, APPELLANT

vs.

JOHN E. BENNETT, Warden, APPELLEE

APPLICATION TO APPEAL WITHOUT PAYMENT OF FEES OR COSTS, AND FOR LEAVE TO USE TYPEWRITTEN RECORDS, BRIEFS AND ARGUMENTS—filed March 24, 1965.

Comes now Lawrence Long, appellant in the above entitled cause from the Lee District Court, and makes application to appeal without payment of fees or costs in connection with the filing or prosecution of such appeal to the Supreme Court of Iowa, and for leave to submit the appeal upon typewritten records, briefs and arguments because of appellant's inability to pay costs of printing same.

Respectfully submitted,

/s/ Lawrence Long
LAWRENCE LONG
28411
Box 316
Fort Madison, Iowa

[fol. 34]

IN THE SUPREME COURT OF THE STATE OF IOWA

General No. ——

LAWRENCE LONG, PLAINTIFF

vs.

THE DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY, FORT MADISON, IOWA, DEFENDANT

PETITION FOR WRIT OF CERTIORARI

Comes now Lawrence Long, and presents this, his Petition for a Writ of Certiorari directed to the District Court of Iowa in and for Lee County at Fort Madison, Iowa, and for cause states:

1. That the District Court of Iowa in and for Lee County at Fort Madison, Iowa, on the 23rd day of March, 1965 acted illegally and in disregard of mandates of the Supreme Court of the United States whereas:

(a) Plaintiff herein caused a Petition for Writ of Habeas Corpus to be filed in the District Court of Iowa in and for Lee County at Fort Madison, Iowa on the 13th day of January, 1965. Case No. 13943.

(b) The District Court of Iowa in and for Lee County at Fort Madison, Iowa, on January 18th, 1865, entered an order granting an evidentiary hearing to be commenced on January 29th, 1965, in the courtroom of the Lee County Courthouse, Fort Madison, Iowa.

(c) Plaintiff an indigent inmate of the Iowa State Penitentiary, requested before the Court that counsel be appointed to effectively prosecute his Petition for Writ of Habeas Corpus. The Court Refused.

[fol. 35] (d) After hearing, the District Court of Iowa In and for Lee County at Fort Madison, Iowa, entered an order denying the Writ of Habeas Corpus on the 20th day of February, 1965.

(e) Plaintiff thereafter made application to the District Court of Iowa in and for Lee County at Fort Madison, Iowa, requesting that he be furnished a copy of the transcript without payment of fees, and further for appointment of counsel to prosecute an appeal to the Su-

preme Court of Iowa from the adverse order of the District Court entered on the 20th day of February, 1965.

(f) The District Court of Iowa in and for Lee County at Fort Madison, Iowa, denied the application for transcript and the appointment of counsel to prosecute an appeal to the Supreme Court of Iowa on the 23rd day of Mar., 1965, upon grounds that there are no provisions in the Iowa law for the furnishing of transcripts or for the appointment of counsel to prosecute an appeal in a civil matter. A true copy of which is appended hereto.

2. That the order of the District Court of Iowa in and for Lee County at Fort Madison, Iowa, entered on the 23rd day of March, 1965, constitutes a denial of due process of law and equal protection of the laws under provisions of the Constitution of the United States, Amendment 14, Section 1 thereof, whereas:

(a) Plaintiff was permitted to commence proceedings by the post-conviction remedy of habeas corpus without without the payment of fees or costs because of his indigency, pursuant to *Smith* v. *Bennett*, 81 S. Ct. 895, notwithstanding the absence of state statutes therefor.

(b) The order of the District Court of Iowa in and for Lee County at Fort Madison, Iowa, entered on the 23rd day of March, 1965 denying indigent plaintiff a transcript without payment of fees denies him due process of law and equal protection of the laws under provisions of the [fol. 36] Constitution of the United States, Amendment 14, Section 1 thereof, in that plaintiff, a pauper, is unable to purchase a transcript and is therefore foreclosed from pursueing all phases of his appeal, other than the mere filing of his intention to, or notice of appeal.

3. Denial of a transcript to indigent plaintiff wishing to appeal as of state right from a denial of a writ of Habeas corpus constitutes denial of due process of law and equal protection of the laws, whereas:

(a) Denial of a transcript to indigent plaintiff attempting to appeal after a hearing and denial of a writ of habeas corpus by the District Court of Iowa in and for Lee County at Fort Madison, Iowa, deprives plaintiff from pursueing an appeal granted as of right; Iowa Constitution, Section 13, Art. 1; Chapter 663, Code of Iowa, 1962, Rule 331, Rules of civil proceedure.

(b) Iowa has chosen to establish a system of appellate review whereby a person so wishing may appeal from a denial of a writ of habeas corpus as of right. Unfortunately this system favors the more rich. It cannot be said that full appellate review can be obtained when an indigent is forced to attempt an appeal compiling his record by memory, but a person taking an appeal and having money is upon payment furnished a transcript as of right. Does Iowa's appellate system afford the same due process and equal protection of the laws to the rich and poor alike, when a person with sufficient funds can obtain a transcript and appeal as of right to the Supreme Court of Iowa from a denial of a writ of habeas corpus, but an indigent after filing notice of appeal and making application for a transcript without payment suddenly discovers that his means of pursueing his appeal and receiving full and adequate appellate review are crushed due to his indigency.

4. The order of the District Court of Iowa in and for Lee County at Fort Madison, Iowa, entered on the 29th day of January, 1965, denying plaintiff the appointment of counsel tp prosecute a petition for writ of habeas [fol. 37] corpus at a hearing for such granted by the defendant Court and the order of the 23rd day of March, 1965, denying plaintiff the appointment of counsel to prosecute an appeal to the Supreme Court of Iowa denies him due process of law and equal protection of the laws under provisions of the Constitution of the United States, Amendment 14, Section 1 thereof, in that the plaintiff, a pauper, was unable to employ or retain counsel at the time of the hearing and is unable now to employ or retain counsel to represent him in an appeal to the Supreme Court of Iowa from an order of the Lee County District Court denying a writ of habeas corpus.

(a) The orders of the District Court of Iowa in and for Lee County at Fort Madison, Iowa, denying indigent plaintiff appointment of counsel are clearly discriminatory against him as a pauper and denies him due process and equal protection of the laws, in that plaintiff, sueing for his freedom as of right, chapter 663, 1962 Code of Iowa, was foreclosed because of his indigency from having legal

representation in the form of professional counsel to represent him at his hearing for writ of habeas corpus, which he was allowed to commence pursuant to *Smith* v. *Bennett*, 81 S. Ct. 895, (1961), with the Court clearly understanding that he was not able to pay the few dollars filing fee. In view of this evidence plaintiff with an eighth grade education was made to attempt to argue the fine points of law against the County Attorney of Lee County, Iowa, before the District Court of Iowa, in and for Lee County at Fort Madison, Iowa, but if plaintiff would have had monies he could have as of right, employed counsel to represent him at his habeas corpus hearing. Plaintiff has been denied appointment of counsel to represent him in his appeal to the Supreme Court of Iowa. This can only mean that even if he had the means to obtain a transcript to carry on his appeal he will be made to match legal knowledge with the Iowa Attorney General's office in attempting to put his case before the Supreme Court of Ia.

(b) Iowa has established an appellate system whereby plaintiff may appeal as of right, whereas from the order [fol. 38] of the District Court of Iowa in and for Lee County at Fort Madison, Iowa denying his Petition for Writ of Habeas Corpus, but plaintiff due to his indigency cannot enjoy the same degree of legal representation which would be his as of right if he had money, as the person enjoys who has money.

(c) The act of the District Court of Iowa in and for Lee County at Fort Madison, Iowa in denying plaintiff a transcript and the appointment of counsel to represent him at his hearing and to prosecute an appeal to the Supreme Court of Iowa, denies plaintiff due process of law and equal protection of the laws in that it denies to plaintiff, as a pauper, that right to appeal which it would otherwise grant him were he not a pauper. Further, the act of the District Court of Iowa in and for Lee County at Fort Madison, Iowa in denying plaintiff a transcript and the appointment of counsel to prosecute an appeal to the Supreme Court of Iowa after authorizing commencement of the original proceedings in the District Court without the payment of fees or costs therefor because of plaintiff's indigency is contrary to the mandates

of the Supreme Court of the United States in *SMITH* vs *BENNETT*, 81 S.Ct. 895, (1961); *LANE* vs *BROWN*, 83 S.Ct. 768, (1963).

Wherefore, plaintiff requests this Court issue a Writ of Certiorari directed to the District Court of Iowa in and for Lee County at Fort Madison, Iowa, commanding such Court to transmit the certified records in Case No. 13943, entitled, Lawrence Long, Plaintiff, vs John E. Bennett, Warden, Iowa State Pentitentiary, Fort Madison, Iowa, Defendant, to the Clerk of the Supreme Court of Iowa forthwith, that this Court may review the records and determine therefrom whether or not plaintiff is being or has been denied due process of law or equal protection of the laws under provisions of the Constitution of the United States, Amendment 14, Section 1 thereof, by being denied a transcript of his habeas corpus hearing and appointment of counsel to represent him in appellate proceedings before the Supreme Court of Iowa in such cause.

[fol. 39]

Respectfully submitted,

/s/ Lawrence Long
LAWRENCE LONG
28411
Box 316
Fort Madison, Iowa
Plaintiff.

STATE OF Iowa)
ss.
COUNTY OF LEE)

SUBSCRIBED and SWORN to before me this 6 day of April, 1965.
(month) (year)

/s/ Ralph D. Moehn
Notary Public

My commission expires
7- 4- 66
(Month, day, year)

[fol. 40]

IN THE SUPREME COURT OF THE STATE OF IOWA

[File Endorsement Omitted]

LAWRENCE LONG, PLAINTIFF

vs.

THE DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY, FORT MADISON, IOWA, DEFENDANT

APPLICATION FOR LEAVE TO PROCEED WITHOUT PAYMENT OF FEES OR COSTS—filed April 7, 1965

STATE OF IOWA)
SS.
COUNTY OF LEE)

Herein I, Lawrence Long, being first duly sworn, depose and state that I am a pauper, without funds or means to obtain funds with which to pay fees or costs in connection with prosecuting or filing my hereto attached Petition for Writ of Certiorari. I believe I am entitled to the redress I seek, and request the appointment of counsel to represent me in my proceedings for a Writ of Certiorari.

/s/ Lawrence Long
LAWRENCE LONG
Box 316, Reg. 28411
Fort Madison, Iowa
Plaintiff.

SUBSCRIBED and SWORN to before me this 6 day of April, 1965.
(Month) (year)

/s/ Ralph D. Moehn
(Notary Public)

My commission expires
7- 4- 66
(Month, day, year)

Order

Petition for certiorari filed, considered & denied. See in this connection, Waldon vs. District Court of Lee County, Iowa, 130 NW 2d 728. Done this 3 day of May, 1965.

/s/ T. G. Garfield
Chief Justice

[fol. 41]

IN THE SUPREME COURT OF THE STATE OF IOWA

* * * *

Appeal from Lee District Court.

LAWRENCE LONG, PLAINTIFF

vs.

THE DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY, FORT MADISON, IOWA, DEFENDANT

ORDER DENYING PETITION FOR CERTIORARI—May 3, 1965

Petition for certiorari filed, considered, and denied. See in this connection, Waldon vs. District Court of Lee County, Iowa 130 NW 2d 728.

THE SUPREME COURT OF IOWA

/s/ T. G. GARFIELD, Chief Justice

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 42]

SUPREME COURT OF THE UNITED STATES

No. 206 Misc., October Term, 1965

LAWRENCE LONG, PETITIONER

v.

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 28, 1966

On petition for writ of Certiorari to the Supreme Court of the State of Iowa.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the following question:

Did the refusal of the state trial court to provide a transcript for the petitioner, solely because state law made no provision for furnishing of a transcript without the payment of a fee, deny the petitioner the opportunity to obtain full appellate review of the trial court's denial of the petitioner's petition for a writ of habeas corpus and thereby deprive the petitioner of the equal protection of the laws?

The case is transferred to the appellate docket as No. 1068 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 77

LAWRENCE LONG,

Petitioner,

vs.

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the District Court of Lee County, Iowa, is found at R 36 and is not officially reported. The order of the Supreme Court of Iowa has not been published in the official reports and is found at R 44.

Concise Statement of Grounds on Which Jurisdiction of Court Invoked

The jurisdiction of this court is invoked under 28 United States Code, Sections 1257 and 2101(c). The date of the order of the Supreme Court of Iowa sought to be reviewed

is May 3, 1965. A petition for certiorari was filed in this case on May 20, 1965.

Constitutional Provisions and Statutes Involved

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Article I, Sec. 13, Constitution of the State of Iowa: "The writ of habeas corpus shall not be suspended or refused when application is made as required by law, unless in case of rebellion, or invasion the public safety may require it."

Rules 331(a), 340, Rules of Civil Procedure, Iowa Code (1962). (Text set forth in appendix).

Question Presented for Review

The order granting certiorari stated the question presented for review as follows:

Did the refusal of the state trial court to provide a transcript for the petitioner, solely because state law made no provision for furnishing of a transcript without the payment of a fee, deny the petitioner the opportunity to obtain full appellate review of the trial court's denial of the petitioner's petition for a writ of habeas corpus and thereby deprive the petitioner of the equal protection of the laws?

Statement of the Case

Petitioner was arrested on April 9, 1963, in Mahaska County, Iowa, and charged with larceny. He appeared before the committing magistrate the following day without counsel and a plea of guilty was recorded (R 1). Petitioner thereafter appeared at arraignment in district court and pled not guilty. Not being able to furnish bond, the petitioner was held in custody until trial of the case some six months later.

The district court jury returned a verdict of guilty on the larceny charge and fixed the value of the property allegedly taken, a pump, at $25.00 (R 8). On October 21, 1963, the petitioner was sentenced to be confined at the State Penitentiary at Fort Madison, Iowa, for a term not exceeding five (5) years. He is presently serving this sentence. Petitioner's conviction was affirmed on appeal by the Supreme Court of Iowa in *State* v. *Long*, 130 N.W.2d 663 (Iowa 1964).

Petitioner filed a petition for writ of habeas corpus on January 13, 1965 in the District Court of Iowa, Lee County, this being the county wherein Fort Madison penitentiary is located. Contained in the application were certain grounds contesting the legality of petitioner's restraint, including the denial of counsel at preliminary hearing and lack of speedy trial (R 16). Petitioner further contended that he was denied counsel during police interrogation and that his court appointed attorney was incompetent. The appeal in *State* v. *Long* had dealt with only one aspect of these claims, the right to speedy trial. After an evidentiary hearing, wherein petitioner was not permitted appointed counsel, the Lee County District Court entered an order denying the petition for writ of habeas corpus.

Petitioner next filed a notice of appeal to the Supreme Court of Iowa to obtain review of the lower court's order. In connection therewith he made application to the Lee County District Court for a copy of the hearing transcript, setting forth his inability to pay for same (R 34). The Lee County District Court denied the request in an order dated March 23, 1965 (R 36).

Thereafter petitioner filed a petition for certiorari to the Supreme Court of Iowa contending that the lower court's action in denying the request of an indigent inmate for a transcript was unlawful and in violation of his constitutional rights. On May 3, 1965, the Iowa Supreme Court entered an order summarily denying the application for certiorari (R 44).

A petition for certiorari and a motion for leave to proceed *in forma pauperis* were filed in this Court. On February 28, 1966, this Court granted the motion for leave to proceed *in forma pauperis* and granted certiorari limited to the question of whether the denial of a habeas corpus hearing transcript deprived the petitioner of equal protection of law (R 45).

Summary of Argument

In Iowa, there is no statutory provision which specifically authorizes the furnishing of a trial transcript to an indigent in habeas corpus proceedings. Since no meaningful equivalent is provided, the indigent applicant for habeas corpus is required to pursue an appeal from the lower court's denial of habeas corpus relief without an adequate record. This procedure denies meaningful appellate review to the poor while granting such review to others.

Appeal from a denial of a petition for habeas corpus is a matter of right under Iowa law. The petitioner in the instant case was effectively foreclosed from fully exercising that right because of his financial inability to purchase a stenographic transcript of the habeas corpus proceeding.

The action of the Iowa courts in denying petitioner's application for a transcript is inconsistent with *Lane* v. *Brown*, 372 U.S. 477, *Griffin* v. *Illinois*, 351 U.S. 12, and related cases. *Lane* v. *Brown* makes clear that *Griffin* v. *Illinois* applies in state post-conviction proceedings. Whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor. An indigent defendant is entitled to an adequate record on appeal from the denial of a petition for writ of habeas corpus.

An indigent defendant is denied equal protection of the law when he is denied an appeal on equal terms with other defendants, solely because of his lack of funds. And this point applies with particular force where the indigent is an applicant for the Great Writ.

ARGUMENT

A. An Appeal in Habeas Corpus Proceedings is a Matter of Right Under Iowa Law.

Habeas corpus is an established method for post-conviction testing of the legality of a prison's restraint under Iowa law. The Constitution of the State of Iowa provides for the writ of habeas corpus. Article I, Sec. 13, Constitution of the State of Iowa. Implementing this right are extensive statutory provisions setting forth procedures to obtain a habeas corpus hearing. Ch. 663, Iowa Code,

1962. Iowa affords a right of appeal to persons aggrieved by denial of a petition for writ of habeas corpus. The matter of appeal is not discretionary in Iowa. As stated in *Waldon* v. *District Court of Lee County,* 130 N.W.2d 728, 731 (Iowa 1964):

> "The writ of habeas corpus is provided for in our constitution, Sec. 13, Art. I:
>
> 'The writ of habeas corpus shall not be suspended, or refused when application is made as required by law, unless in case of rebellion, or invasion the public safety may require it.'
>
> The requirements of law are set forth in chapter 663, Code of Iowa, 1962, I.C.A., and the judgment is appealable to this court as a matter of right. Rule 331, Rules of Civil Procedure, 58 I.C.A. Alberts v. Lainson, 250 Iowa 748, 94 N.W.2d 94."

The petition for writ of habeas corpus was filed in the instant case on January 13, 1965 (R 15) by the petitioner. The legality of his imprisonment had not been adjudged on a prior proceeding of this character. Under the laws of the State of Iowa as set forth above he had a right to review by the Iowa Supreme Court of the lower court's determination concerning the legality of his restraint. This could not be adequately accomplished without providing the prisoner as a minimum with a transcript of the habeas corpus proceedings. Review of habeas corpus judgments are available to all, and those with sufficient funds can obtain meaningful review with the aid of a court reporter's transcript. Where a state grants appellate review it cannot do so in a way that discriminates against indigent defendants on account of their poverty. *Griffin* v. *Illinois,* 351 U.S. 12.

B. There Is No Provision Under Iowa Law Which Specifically Authorizes the Preparation of a Transcript for an Indigent Prisoner Without Cost in Habeas Corpus Proceedings.

The petitioner filed a notice of appeal from the lower court order denying his petition for habeas corpus, and the Supreme Court of Iowa was vested with jurisdiction to review the lower court's judgment. Petitioner further applied for a court reporter's transcript of the proceeding in habeas corpus without payment of costs (R 34). This application was denied by the lower court in an order which recited that there was no provision in the law for the furnishing of a transcript without the payment of fee (R 36).

The Iowa Code provides for the preparation of a transcript without cost to the defendant in a criminal cause where he is indigent. Sec. 793.8, Iowa Code (1962). This section does not set forth its application to habeas corpus proceedings. That the section applies to all indigents on direct appeal was discussed in *Weaver* v. *Herrick*, 140 N.W.2d 178, 180 (Iowa 1966):

> "The matter of appeal by a defendant in a criminal case is not discretionary in Iowa. He may appeal as a matter of right. Section 793.1, Code, 1962, provides that either the defendant or state may appeal.
>
> Rule 16 of this court provides that if a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall follow certain procedures therein set out.
>
> The provisions of this rule, like the right to appeal, is available to all convicted defendants. Printing the

record and necessary briefs costs money. Defendants who are able to pay for such printing are thus assured of a full review on their appeal. To assure an indigent defendant the same rights as are afforded a defendant with means, section 793.8, Code, 1962, provides for furnishing him a transcript at county expense, and section 775.5 as amended by chapter 449, Laws Sixty-first General Assembly, provides for payment of the printing of the trial record and necessary briefs. The alternative of rule 16 is an appeal on a clerk's transcript."

The above case cites with approval the proposition that while a state is not required by the Federal Constitution to provide appellate review, when it does so it may not discriminate against some convicted defendants because of indigency. The principle appears equally applicable to habeas corpus appeals.

The procedures for preparing a habeas corpus appeal are controlled by Rule 331, Rules of Civil Procedure, Iowa Code (1962) and subsequent rules. Rule 331 establishes the right to appeal from all final judgments. Rule 340 governs the record on appeal and provides that the appealing party shall file an abstract of the record and a copy of the court reporter's transcript promptly after taking the appeal. The rule states:

"(a) Promptly after taking an appeal to the supreme court, appellant shall file with the clerk of the trial court duplicate typewritten *abstract* of so much of the record in that court, including pleadings, evidence, rulings, orders, judgment and all proceedings in the case, as is material to the appeal. Where exhibits will be

copied in full in the printed record, the abstract may so state and refer to them by letter, number of other appropriate designation, without copying them.

The reporter's transcript shall be filed at the same time; and these rules relative to it shall also apply to bills of exceptions under rule 241. The cost of the transcript shall be taxed in the trial court.

The clerk shall forthwith notify the attorneys of record for the appellee of such filing."

An alternate method is provided under 340(j), whereby the parties may present an agreed record setting forth so much of the facts pleaded or proved as are necessary to a decision. In either instance, transcript is crucial. Proceeding under Rule 340(a), the petitioner needs a transcript to prepare his abstract, and the rule further provides that a transcript should be filed promptly. Under the alternate method provided by Rule 340(j), it would be well nigh impossible for an indigent without a transcript to set forth the necessary facts. Denying him a transcript forces the indigent to rely on memory, and where several witnesses have testified at the habeas corpus hearing this will be extremely difficult. In addition to the problem of the petitioner being unable to accurately remember the testimony, the other party may be unable or refuse to agree to the record, which agreement is necessary under this rule.

The decision in *Lane* v. *Brown,* 372 U.S. 477, left open the question of what screening procedures might be permissible in post-conviction cases where applicable alike to all petitioners. Such problem is not involved here. There was no screening process used to deny the petitioner the right he sought to enforce. The petitioner was denied a

transcript solely because of his poverty. Such transcript was essential to a meaningfu' appeal. In the Brief for the Respondent in Response to the Petition for a Writ of Certiorari, p. 8, the state comments that a "hearing transcript would no doubt be helpful in most appeals . . . " Indeed, under the Iowa provisions it is critical.

C. Iowa May Not Constitutionally Deny an Indigent Petitioner for Writ of Habeas Corpus a Transcript Necessary for Full Appellate Review.

1. *Lane* v. *Brown.*

In *Lane* v. *Brown,* 372 U.S. 477, the petitioner was convicted of murder and sentenced to death, and the conviction was affirmed on appeal. He then filed a petition for collateral relief. After a hearing on the petition, it was denied. The defendant then applied to the court for a transcript of the hearing in preparation for an appeal from the denial. The rules of the State Supreme Court permitted review but required that a transcript be filed with the Supreme Court. The defendant's request was denied, the state court ruling that only the public defender could procure the transcript. The public defender had previously taken the position that an appeal would be unsuccessful and refused to order the transcript.

The Supreme Court of the United States held that where an appeal is accorded as of right, the exercise of that right cannot be made to depend upon the prisoner's ability to purchase a transcript:

> "The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith, and Eskridge. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal convic-

tion, but Smith makes clear that the Griffin principle also applies to state collateral proceedings, and Burns leaves no doubt that the principle applies even though the State has already provided one review on the merits." 372 U.S. at 484-485.

Rule 2-40 of the Indiana Supreme Court, 1958 Edition, provided that a transcript of so much of the record as was necessary should be filed with the clerk of the Supreme Court within ninety days after the decision of the lower court. In the instant case, Rule 340(a) Iowa Rules of Civil Procedure, provides that a transcript shall be filed by the appealing party promptly after taking an appeal. Under the latter rule the transcript is essential to the presentation of an evidentiary record, and without the record there can be no effective appeal. Under Rule 340 the only provision wherein an appeal record may be prepared without a transcript is Rule 340(j). This requires agreement of the opposing party to the record, which the state may be unwilling or unable to provide. Should agreement be impossible, the petitioner must proceed under Rule 340(a) wherein a transcript is essential. Thus, these provisions of Iowa law appear to leave foreclosure of effective appeal within the discretion of a non-judicial officer, a feature of law clearly prohibited in *Lane* v. *Brown.*

2. *Griffin* v. *Illinois.*

The petitioner in *Griffin* v. *Illinois,* 351 U.S. 12, was convicted of armed robbery in Illinois. He filed a motion requesting that a certified copy of the record, including a transcript of the proceedings be furnished him without cost. He alleged that he was a poor person without funds to acquire a transcript. The Illinois courts denied his mo-

tion, refusing to furnish him with a transcript at public expense. The question presented was whether Illinois could, consistent with the Due Process and Equal Protection Clauses of the 14th Amendment, administer the statute so as to deny adequate appellate review to the poor while granting such review to others. The Supreme Court of the United States held that the defendant must be furnished with a transcript, or an adequate substitute. The opinion states:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and none which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., McKane v. Durston, 153 US 684, 687, 688, 38 L ed 867-869, 15 S Ct 913. But that is not to say a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18.

The denial of a transcript in the instant case is violative of this principle in that it deprives the petitioner of adequate appellate review based upon ability to pay. That the *Griffin* principle is applicable to habeas corpus proceedings is made clear in *Lane* v. *Brown.*

The state has, in this case, discriminated against the petitioner in not granting his application for a transcript to pursue an appeal from the denial of habeas corpus. This discrimination is founded upon petitioner's indigency—a

discrimination and classification that is clearly against the Equal Protection and Due Process clause of the 14th Amendment. Due to this discrimination, the petitioner is denied the opportunity to have this case heard in an adequate appeal, which opportunity is enjoyed by other petitioners with funds. The court is concerned with the adequacy of appeal in the *Griffin* case. The state there conceded that it is sometimes impossible to prepare an adequate appeal record without a transcript of lower court proceedings. Preparation from memory is not the equivalent of a court reporter's transcript, yet preparation from memory is exactly what the order of March 23, 1965 (R 36) would force petitioner to do in the instant case. This is inconsistent with the principle of the *Griffin* case which states that destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

3. *Smith* v. *Bennett.*

The question in *Smith* v. *Bennett,* 365 U.S. 708, concerned the validity, under the Equal Protection clause of the 14th Amendment, of the requirement of Iowa law that necessitated the payment of statutory filing fee by an indigent prisoner of the state before an application for a writ of habeas corpus or the allowance of an appeal in such proceedings would be docketed. The court noted that the Great Writ is an available post-conviction remedy in Iowa and held equal protection of the laws prohibited the imposition of financial hurdles as a condition of exercising the right to habeas corpus remedies.

4. *Burns* v. *Ohio.*

In *Burns* v. *Ohio,* 360 U.S. 252, the petitioner was convicted and his conviction was affirmed by the Ohio Court of Appeals. The clerk of the highest court of the state refused to file a motion for leave to appeal from the judgment of the intermediate state court without payment of a $20 docket fee. This Court granted certiorari and the question presented was whether a state may constitutionally require an indigent defendant in a criminal case to pay filing fee before permitting him to file a motion for leave to appeal. The Court held that the state of Ohio could not constitutionally impose financial barriers restricting the availability of appellate review for indigent defendants. It should be noted that the defendant in the *Burns* case had received one review of his conviction and the review he was seeking was a matter of discretion. In the instant case, review is a matter of right.

5. *Eskridge* v. *Washington State Board of Prison Terms and Paroles.*

The *Griffin* rule was applied in *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214, where the court said that a State "denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trial". 357 U.S. at 216.

6. *Draper* v. *Washington.*

After conviction in a Washington State Court, the defendants in *Draper* v. *Washington,* 372 U.S. 487, filed timely notices of appeal. They moved the trial judge to order

preparation of a free transcript of the record. The trial judge denied the motions for transcript on the grounds that the assignments of error were frivolous. Defendants sought review in the Supreme Court of Washington, which held the trial court's action to be without error. On certiorari, the Supreme Court of the United States reversed. This Court held that the 14th Amendment was violated by the Washington practice, and the opinion of Mr. Justice Goldberg sets forth the principle applicable to the case at bar:

> "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." 372 U.S. at 496.

The petitioner in the instant case was not provided with as adequate and effective appellate review as that given appellants with funds. The nonindigent defendant could obtain a transcript necessary to meaningful appellate review. No equivalent means are provided for indigent defendants under the Iowa Rules, and no alternate to a transcript was granted this petitioner. The order denying a transcript to petitioner, an indigent prisoner, deprived the petitioner of the right to present his contentions to the appellate court on a basis as good as that available to the nonindigent defendants with similar contentions.

D. The Rule of Lane v. Brown and Related Cases Control the Instant Case.

Lane v. *Brown* makes clear that *Griffin* v. *Illinos* is applicable in state habeas corpus proceedings. A recent state decision refers to the principle that whenever a state affords a collateral remedy to attack a criminal conviction, an indigent applicant is entitled to an adequate record on appeal. In *People* v. *Shipman,* 42 Cal.Rep. 1, 397 P.2d 993 (1965), the petitioner's application for writ of error *coram nobis* was denied. In reversing the order denying *coram nobis,* the Supreme Court of California stated:

> "The Attorney General contends that *coram nobis* is a civil remedy and that therefore appointment of counsel is not mandatory. (See People v. Fowler, 175 Cal.App.2d 808, 810, 346 P.2d 792.) Whatever the label, however, *coram nobis* 'must be regarded as part of the proceedings in the criminal case * * * .' (In re Paiva, 31 Cal.2d 503, 510, 190 P.2d 604, 609), and it is an established remedy for challenging a criminal conviction. (See Id. at p. 505, 190 P.2d 604; In re Horowitz, 33 Cal.2d 534, 537, 203 P.2d 513; 51 Cal.L.Rev. 970, 978.) It is now settled that whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor. An indigent defendant is entitled to an adequate record on appeal not only from a judgment of conviction (Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Eskridge v. Washington State Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899), but from the denial of a petition for a

writ of *coram nobis* (Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; see McCrary v. Indiana, 364 U.S. 277, 80 S.Ct. 1410, 4 L.Ed.2d 1706)." 397 P.2d at 996.

See also *Medberry* v. *Patterson,* 188 F.Supp. 557.

Dismissal of appeal for failure to file a transcript was the question considered in the case of *Daugharty* v. *Gladden,* 257 F.2d 750. Petitioner by motion sought a transcript for appeal from a state habeas corpus proceeding wherein his application for habeas corpus was denied. The Oregon Supreme Court dismissed the appeal upon motion of the attorney general. The petitioner instituted a Federal habeas corpus proceeding. On review thereof the Court of Appeals for the Ninth Circuit stated that the principle of *Griffin* v. *Illinois* applied to habeas corpus proceedings and dictated the result:

> "In Griffin, the question involved the supplying of a required transcript in an appeal from a judgment of conviction, brought to review asserted errors of law committed at the trial. Here the question involves the supplying of a required transcript on appeal in a habeas corpus proceeding, in which it is claimed that there were violations of constitutional rights under the Oregon constitution which rendered the judgment of conviction void.
>
> The Oregon Supreme Court has held that the Griffin rule applies regardless of such a distinction in the nature of the proceedings. In Barber v. Gladden, 210 Or. 46, 298 P.2d 986, 990, 309 P.2d 192, it was held, applying the rule of Griffin, that a statute which requires an applicant for a writ of habeas corpus to file an undertaking on appeal, in order to obtain an appellate

> review, is unconstitutional as applied to an indigent person, thus requiring waiver of the statutory requirement. The principle thus announced, there applied with reference to the supplying of an appeal bond, would seem to have equal application with regard to the furnishing of a required transcript." 257 F.2d 750 at 759-760.

See also *Barber* v. *Gladden,* 210 Or. 46, 298 P.2d 986 (1956); *People* v. *Dean,* 31 Ill.2d 214, 201 N.E.2d 405 (1964).

When the state affords a collateral remedy, an indigent is entitled to an adequate record on appeal from denial of that remedy. The guiding principles set forth in *Lane* v. *Brown* and *Griffin* v. *Illinois* are fully applicable to collateral attack proceedings regardless of the label affixed to the proceeding. *Griffin,* concerning itself with the adequacy of appeal and not necessarily with the so-called access of appellants to appellate courts, strikes down state procedure in which the kind of appeal a man enjoyed depends upon the amount of money he has. The Iowa procedure involved in this case produces exactly that result. The trial court prevents the petitioner from having a stenographic transcript of the proceedings, and no equivalent for presentation is provided. Indeed, the transcript is essential, and its denial is invidious discrimination violative of Due Process and Equal Protection of Law.

Iowa has emphatically recognized that a full stenographic transcript must be provided an indigent defendant on direct appeal to prevent unconstitutional discrimination:

> "To afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necessary briefs is required." Weaver v. Herrick, 140 N.W.2d 178, 181 (Iowa 1966).

The above case takes cognizance of the critical necessity of a transcript for meaningful appeal in Iowa. The same reasoning applies with particular force to habeas corpus appeals. "Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained." *Smith* v. *Bennett,* 365 U.S. at 714. It is vital that no applicant for the Great Writ be precluded from its benefit due to lack of funds. As aptly summarized in 51 Iowa Law Review 883, 930:

> "Iowa should, by statute, provide a transcript for indigents in habeas corpus actions. No valid reason exists for furnishing a transcript on the first appeal but not in collateral proceedings. . . . Recently the United States Supreme Court granted certiorari in an Iowa case in which the defendant was refused a transcript in an appeal from the denial of a writ of habeas corpus. Long v. District Court, 86 Sup. Ct. 934 (1966). In light of the Court's handling of an analogous problem in *Lane* v. *Brown,* it seems very possible that Iowa will be directed to furnish a transcript in such situations."

The National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Post-Conviction Procedure Act. 9B Uniform Laws Annotated 352. See also Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 17. Section 5 of the Uniform Act provided as follows:

> "§ 5. [Proceeding as a Poor Person].—The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall

order that the petitioner proceed as a poor person, and appoint counsel for him. If after judgment, a review is sought by the petitioner, and the hearing court is of the opinion that the review is requested in good faith, and finds that the petitioner is unable to pay the costs of the review, the court shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by [the county in which the judgment is rendered]."

The newly revised Section 5 provides as follows:

"SECTION 5. [*Inability to Pay Costs.*] If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, and legal services, these costs and expenses shall be made available to the applicant in the preparation of the application, in the trial court, and on review."

The above section is significant here in its recommendation that review of the lower court's judgment upon stenographic transcript is provided an indigent prisoner within the guidelines of the section. Not only is this desirable, it is constitutionally required under the rule of *Lane* v. *Brown* and related cases.

Conclusion

Meaningful appeal has been denied the petitioner because of his lack of funds to purchase a stenographic transcript of the proceedings in the lower court. The indigent defendant is denied equal protection of the laws under such procedure which discriminates between rich and poor. As stated in *Bandy* v. *United States,* 81 S.Ct. 197, "We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence." It is submitted that the orders of the District Court of Iowa, Lee County (R 36) and the Supreme Court of Iowa (R 44) are inconsistent with these established principles and should be vacated, and the case remanded so that appropriate orders may be entered ordering petitioner's discharge from custody unless within a reasonable time the State of Iowa provides him with a transcript of his habeas corpus hearing on January 29, 1965.

Respectfully submitted,

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College of Law
University of Iowa
Iowa City, Iowa
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APPENDIX

Section 331(a), Rules of Civil Procedure, Iowa Code (1962):

"All final judgments and decisions of courts of record, and any final adjudication in the trial court under rule 86 involving the merits or materially affecting the final decision, may be appealed to the supreme court, except as provided in this rule and in rule 333. For the purpose of this rule any order granting a new trial (not including an order setting aside a judgment by default other than in actions for divorce or annulment) and any order denying a new trial shall be deemed a final decision. Any order setting aside a default decree of divorce or annulment shall also be deemed a final decision."

Section 340, Rules of Civil Procedure, Iowa Code (1962):

"(a) Promptly after taking an appeal to the supreme court, appellant shall file with the clerk of the trial court duplicate typewritten *abstract* of so much of the record in that court, including pleadings, evidence, rulings, orders, judgment and all proceedings in the case, as is material to the appeal. Where exhibits will be copied in full in the printed record, the abstract may so state and refer to them by letter, number or other appropriate designation, without copying them.

The reporter's transcript shall be filed at the same time; and these rules relative to it shall also apply to bills of exceptions under rule 241. The cost of the transcript shall be taxed in the trial court.

The clerk shall forthwith notify the attorneys of record for the appellee of such filing.

(b) If the abstract does not embrace the whole record, and all evidence and proceedings in the transcript, depositions and exhibits, it shall include a concise state-

ment of all points upon which appellant will rely on the appeal, which shall be limited thereto.

(c) Within twenty days after such filing, or such longer time as the trial court may allow or the parties agree to in writing, any other party to the appeal may, in like manner, file duplicate amendments to appellant's abstract, proposing corrections, substitutions or additions thereto. At the expiration of the time for amendment, either party, on not less than three days written notice, may present the proposed abstract and all such proposed amendments, if any, to the judge before whom the case was tried, who shall settle any differences to the end that the abstract correctly shows the evidence and proceedings at the trial, and is in form as provided by these rules. The trial court shall then append to appellant's proposed abstract an order settling the same with any corrections, substitutions or additions it has allowed in conformity with these rules.

(d) If a party to the appeal shows the trial court a good reason for setting out part of the testimony in question and answer form, such part may appear by questions and answers. If this is not done, testimony of witnesses shall be abstracted in condensed or narrative form.

(e) Formal parts of all exhibits, and more than one copy of any document, shall be omitted. Documents shall be abridged by omitting formal or irrelevant parts. This rule shall also apply to exhibits to pleadings.

(f) The abstract allowed as above or under paragraph (h) hereof shall constitute the record on which the cause shall be submitted on the appeal. The appellant shall cause it to be printed, so as also to contain in full any exhibits designated in the abstract by number alone, as provided in paragraph (a) hereof.

(g) The supreme court may impose or withhold costs for any addition or substitution of irrelevant matter,

or the use of needless questions and answers for the narrative statement. To aid it in this respect only, the clerk of the trial court, at the request of the aggrieved party, shall certify to the supreme court the reporter's transcript, depositions, exhibits and proposed abstract and amendments thereto.

(h) Instead of proceeding under paragraphs (b) and (c) hereof, the parties may file with or include in the abstract proposed by any party to the appeal, their written agreement that it is correct. The trial court shall thereupon certify that such abstract has been so agreed to, and is the record on appeal.

(i) Abstracts and the printed record shall contain a brief index of their contents, in which the pleadings shall appear in the order of their filing.

(j) *Agreed record.* Instead of proceeding under the foregoing paragraphs (a) to (f) the parties may, promptly after taking an appeal, present for his approval to the judge before whom the case was tried, or if he is not available to any other judge of the same court, an agreed record on appeal. It shall show how the questions arose and were decided in the trial court. It shall either set out so much of the facts pleaded or proved as are necessary to a decision of such questions and to proper disposition of the appeal, or contain an abstract of the relevant proceedings which will enable the supreme court to decide the appeal. It shall include an abstract or copy of the judgment or order appealed from and a brief index of contents. Such agreed record, when approved by said judge, shall be the record on appeal and the appellant shall cause it to be printed, filed with the clerk of the trial court and transmitted to the clerk of the supreme court in accordance with rule 342. [Report 1943; amendment 1961; Nov. 20, 1961]"

No. 77

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

LAWRENCE LONG, PETITIONER,

v.

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR THE RESPONDENT

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LAWRENCE LONG, PETITIONER,

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THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The judgment of the Supreme Court of Iowa will not be officially reported. A true copy of the same is, however, found at page 44 of the record.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on May 3, 1965. The petition for a writ of certiorari was filed with this Court on May 20, 1965.

The petitioner predicates jurisdiction for this Court's review under 28 U.S.C. 1257(3).

QUESTION PRESENTED

The order granting the petitioner's application for certiorari stated the question for review as follows:

> Did the refusal of the state trial court to provide a hearing transcript for the petitioner, solely because state law made no provision for furnishing such transcript without the payment of a fee, deny the petitioner the opportunity to obtain full appellate review of the trial court's denial of the petitioner's petition for a writ of habeas corpus and thereby deprive the petitioner of the equal protection of the laws?

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to respondent's Argument are set forth in Appendix A.

STATEMENT

Lawrence Long was arrested in Mahaska County, Iowa, on April 9, 1963, and charged with larceny as proscribed by Section 709.1 of the 1962 Code of Iowa (R. pp. 1, 3). He was brought before Justice of the Peace W. E. Miner the next day for a preliminary hearing at which time, according to the magistrate's records, he entered a plea of guilty (R. p. 1). Though it is not entirely clear from the present record, the State concedes that at the time of this hearing the petitioner was not represented by counsel.

A county attorney's true information was filed on April 22, 1963, charging larceny (R. pp. 4-5), and when the petitioner was brought that same day before the District Court of Iowa, Mahaska County, for arraignment an attorney was appointed and a plea of not guilty was recorded. The cause came on for trial on October 14, 1963, at the conclusion of which the jury returned a guilty verdict (R. pp. 7-8). On October 21, 1963, the trial court sentenced the petitioner to confinement in the State Penitentiary at Fort Madison, Lee County, Iowa, for a term not to exceed five (5) years (R. pp. 8-9). The judgment of conviction was affirmed on appeal by the Supreme Court of Iowa, *State* v. *Long*, 256 Iowa 1304, 130 N.W.2d 663.

Requesting leave to proceed in forma pauperis, the petitioner, on January 13, 1965, filed an application for a writ of habeas corpus in the District Court of Iowa, Lee County, alleging numerous grounds as to how his restraint under the criminal judgment is unlawful (R. pp. 11-19). The specific contentions as to eligibility for habeas relief will be considered under a portion of the argument relevant thereto (infra, pp. 20-24). The District Court granted the petitioner's request to proceed as a pauper and on January 29, 1965, an evidentiary hearing was held (R. pp. 28, 30). By order dated February 20, 1965, the District Court denied the habeas application (R. pp. 30-31).

The petitioner next filed a notice of appeal to the Supreme Court of Iowa and in connection therewith made application to the Lee County District Court for a free copy of the habeas hearing transcript, such application alleging that the hearing transcript was "necessary to prepare an adequate record with which to prosecute an effective appeal" (R. pp. 32, 34-35). The District Court ruled on March 23, 1965, that habeas corpus is a civil action and

that no provision of law existed for furnishing a free hearing transcript (R. p. 36). Thereupon, the petitioner filed an application with the Iowa Supreme Court praying review by certiorari of the lower court's order denying him a transcript without cost (R. pp. 38-42). The certiorari petition alleged that securing a copy of the transcript was necessary to obtain "full appellate review" and that the order denying a free transcript deprived him of due process and equal protection of law under the Fourteenth Amendment to the United States Constitution (R. pp. 39-40).[1] On May 3, 1965, the Supreme Court of Iowa entered an order summarily denying the application for certiorari, citing *Waldon* v. *District Court of Lee County,* 256 Iowa 1311, 130 N.W.2d 728. This order, a final judgment of Iowa's highest Court, presents the subject matter for this Court's review.

SUMMARY OF ARGUMENT

I

The District Court of Iowa, Lee County, denied the petitioner, an indigent, a free copy of the transcript of the habeas hearing because "habeas corpus being a civil action there is no provision in the law for the furnishing of a transcript without the payment of [a] fee." (R. p. 36). As our first argument, we concede that in view of *Griffin* v. *Illinois,* 351 U.S. 12, and its progeny, whether habeas corpus be labeled a civil or a criminal action is irrelevant to the question of whether an indigent prisoner seeking review of a post conviction proceeding is entitled to a free hearing transcript. As we read those decisions it appears that a substantial majority of this Court, if not the entire

[1]Iowa Rule of Civil Procedure 206 (1962 Code of Iowa, Vol. 2, p. 2689) provides for review by certiorari in the Supreme Court of Iowa "where an inferior tribunal . . . exercising judicial functions, is alleged to have exceeded its . . . proper jurisdiction or otherwise acted illegally."

Court, is committed to the proposition that where a State provides an appeal from the denial of a post conviction remedy it is constitutionally required to provide a means of affording adequate appellate review to indigents seeking such review.

While the trial court erred in its reason for denying the transcript, it doesn't necessarily follow that the Iowa Supreme Court improperly affirmed the lower court's order. We contend the real issue is whether the petitioner can obtain adequate appellate review of the contentions raised in the habeas action without a free hearing transcript. Resolution of that question is the subject matter of the second and third divisions of our argument.

II

As the second portion of our argument, we contend that the Iowa Rules of Civil Procedure applicable to habeas corpus appeals are flexible and present a means by which an indigent appellant can obtain an adequate record for an appeal without resort to a hearing transcript. We argue that, in particular, Rule of Civil Procedure 340, 1962 Code of Iowa, Vol. 2, pp. 2693-2694, requires the trial judge ultimately to settle any difference on a proposed record "to the end that the abstract correctly shows the evidence and proceedings at the trial" and that in this connection the judge can call upon his official short hand reporter to help him execute this function. We recognize that in a given case an indigent appellant may lack the ability to cope with this procedural rule relative to obtaining an adequate record for review but we contend that where an indigent prisoner complains that the State has denied him due process or equal protection of the laws he has not made a sufficient showing of such denial by the mere conclusory allegation that he needs a hearing transcript to get a meaningful appeal.

III

In the final division of our argument, we contend that where an indigent prisoner filed a petition for a writ of habeas corpus attacking the legality of confinement because of things that allegedly occurred during the criminal proceedings, a transcript of the habeas hearing will not be necessary to obtain adequate appellate review of the denial of the petition where a transcript of the criminal proceedings is available and presents a sufficient basis for adequate review of the contentions raised in the habeas action. We note that in the instant case, the petitioner appealed the criminal judgment and in connection with the appeal was provided a transcript of the criminal trial proceedings. We argue that the criminal trial record presents yet another method by which the petitioner can obtain adequate appellate review of the contentions set forth in his petition for habeas relief and that for this reason alone it was not encumbent upon the State to furnish him with a free transcript of the habeas hearing.

ARGUMENT

I

IN VIEW OF *GRIFFIN V. ILLINOIS* AND ITS PROGENY IT APPEARS THAT THE COURT IS COMMITTED TO THE PROPOSITION THAT WHERE A STATE PROVIDES AN APPEAL FROM THE DENIAL OF A POST-CONVICTION REMEDY IT IS CONSTITUTIONALLY REQUIRED TO PROVIDE MEANS OF AFFORDING ADEQUATE AND EFFECTIVE APPELLATE REVIEW TO CONVICTED INDIGENT PERSONS SEEKING SUCH REVIEW.

Lawrence Long's bid for relief in habeas corpus via the Iowa trial court did not succeed and as was his right under Iowa law he sought appellate review in the Supreme Court of Iowa.[2] In connection with the appeal, he moved the

[2]A trial court's judgment denying a petition for a writ of habeas corpus is appealable as a matter of right to the Iowa Court, see Rule 331, Rules of Civil Procedure, 1962 Code of Iowa, Vol. 2, pp. 2691-2692, and *Waldon* v. *District Court of Lee County*, 256 Iowa 1311, 130 N.W.2d 728.

trial court for a free copy of the habeas hearing transcript. Long is an indigent. The trial court denied his request for a hearing transcript stating that habeas corpus is a "civil action" and that "there is no provision of law for the furnishing of a transcript without the payment of fee" (R. p. 36). The Supreme Court of Iowa in denying Long's certiorari petition, in effect, summarily affirmed the lower court's order denying the transcript without cost (R. p. 44). This being the posture of the case, the Attorney General is, from the standpoint of being an advocate, in a somewhat precarious position. A number of decisions of this Court, as we read them, seemingly indicate that whether habeas corpus be labeled a civil or a criminal action is irrelevant to the question of whether an indigent prisoner seeking review of a post conviction proceeding is entitled to a free hearing transcript. Accordingly, it is necessary at the outset to define clearly the relevant criterion to which we must look to ascertain if one in the petitioner's position was or was not entitled to a free hearing transcript. The starting point is, of course, *Griffin* v. *Illinois,* 351 U.S. 12.

Judson Griffin and James Crenshaw having been convicted of armed robbery in Cook County, Illinois, moved the trial court to supply them, without cost, a certified copy of the trial transcript because they were "poor persons with no means of paying the necessary fees to acquire the transcript . . . needed to prosecute an appeal." At the time the motion was denied, as well as when the case ultimately came before this Court, it was necessary under Illinois Law to get full appellate review of trial errors to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge (351 U.S. at 13). In this connection, the Illinois Attorney General conceded that it was sometimes impossible to prepare such bill of exceptions or reports without a stenographic

transcript of the trial; that in other than non-capital cases a defendant needing a transcript must buy it; and that Griffin and Crenshaw "needed a transcript to get adequate appellate review of their alleged trial errors" (351 U.S. at 14-16). The Attorney General argued, however, that the denial of a free transcript did not violate either the Due Process or Equal Protection clause of the Fourteenth Amendment.

A majority of the Court expressed the opinion that where a State provides a scheme for direct review of criminal judgments it cannot, consistent with the Fourteenth Amendment, deny an indigent defendant adequate and effective appellate review because of the inability to purchase a trial transcript. In the words of Mr. Justice Black announcing the Court's judgment "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts" (351 U.S. at 19).[8]

Though the *Griffin* principle of "adequate appellate review despite poverty" was for a time limited in application to direct criminal appeals, *Eskridge* v. *Washington State*

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[8]Technically, there was no opinion of the Court in *Griffin*. Mr. Justice Black announced the Court's judgment and filed an opinion concurred in by Chief Justice Warren and Justices Clark and Douglas. Mr. Justice Frankfurter wrote a special concurring opinion. Mr. Justice Harlan in a dissenting opinion on the merits contended that neither the Due Process or Equal Protection clauses required the result reached by the other five Justices. Subsequent decisions seemingly demonstrate, however, that a substantial majority of the Court, if not the entire Court, is now committed to the *Griffin* proposition as paraphrased in the text to this note. Thus, in *Lane* v. *Brown*, 372 U.S. 477, Mr. Justice Stewart, in speaking for Chief Justice Warren and Justices Black, Douglas, Brennan, White and Goldberg restated as the holding of *Griffin* substantially the proposition set forth in the text. In *Douglas* v. *California*, 372 U.S. 353, decided the same day as *Lane* v. *Brown*, Mr. Justice Clark expressly said that he adheres to his vote in *Griffin* (372 U.S. at 358), and Mr. Justice Harlan wrote that in so far "as the result in [*Griffin*] rested on due process grounds, I fully accept the authority of Griffin" (372 U.S. at 361, note 1).

Board, 357 U.S. 214; and *Burns* v. *Ohio*, 360 U.S. 252, it ultimately became also significant in post conviction proceedings, *Smith* v. *Bennett*, 365 U.S. 708; and *Lane* v. *Brown*, 372 U.S. 477. The latter case is of especial relevance.

Brown was convicted of murder in Indiana and sentenced to death. On appeal the conviction was affirmed and his subsequent petition for a writ of error coram nobis was denied by the State trial court. Indiana permitted an appeal from such denial but also required that the coram nobis transcript be filed in such an appeal before jurisdiction attached. In this respect, under Indiana's public defender act of 1945, only the public defender, in his discretion, could order a transcript of the coram nobis hearing for an indigent's appeal and this the public defender refused to do for Brown. Thus, Brown was denied any appeal at all from the lower court's denial of his coram nobis petition. The Court was unanimous in its judgment that Indiana's procedure violated the Fourteenth Amendment. In delivering the opinion of the Court, Mr. Justice Stewart pointed out that *Griffin* v. *Illinois* "held that a State with an appellate system which made available transcripts to those who could afford them was constitutionally required to provide 'means of affording adequate and effective appellate review to indigent defendants'" (372 U.S. at 482). The *Griffin* principle, said the opinion, also applies to State post conviction proceedings.[4] The case was remanded to the federal district court with directions that an appropriate order be entered providing for Brown's discharge "unless within a reasonable time the State of Indiana provides him an appeal on the merits to the Supreme Court of

[4] "The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith and Eskridge. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal conviction, but Smith makes clear that the Griffin principle also applies to state collateral proceedings. . . ." (372 U.S. at 484).

Indiana from the denial of the writ of error coram nobis" (372 U.S. at 485).

In summary, construing *Griffin* v. *Illinois* and the intervening decisions together with *Lane* v. *Brown,* it appears that a substantial majority of this Court, if not the entire Court, is committed to the proposition that where a State provides a scheme for appellate review of the denial of a post conviction remedy it is constitutionally required to provide means of affording adequate appellate review to indigent prisoners seeking such an appeal. This does not mean, however, that as a constitutional minimum Iowa must furnish a habeas hearing transcript in every case involving an indigent; all that is required is that the State afford the means of obtaining "adequate appellate review" despite poverty, *Griffin* v. *Illinois,* 351 U.S. 12, 20; *Eskridge* v. *Washington State Board,* 357 U.S. 214, 216; *Draper* v. *Washington,* 372 U.S. 487, 495.

Having delineated the constitutional issue applicable to the question of whether Lawrence Long is entitled to a free hearing transcript, we are forced to conclude that the question cannot properly be resolved by a ruling that habeas corpus is a civil action and by stating that State law makes no provision for free transcripts. To this extent, it is our unfortunate duty to concede that the State trial court fell into error. It does not necessarily follow, however, that the Supreme Court of Iowa improperly denied Long's petition for a writ of certiorari seeking review of the lower court's order denying the transcript. As we see it, the real issue is whether the petitioner can obtain adequate appellate review of the contentions raised in his habeas petition without a free hearing transcript, coupled with the question of who has the burden to demonstrate that such a transcript is necessary to such review. In this respect, we think it extremely important to note that both conceptually and

realistically the petitioner still has pending before the Iowa Court an appeal seeking review on the merits of the lower court's denial of his petition for a writ of habeas corpus.[5] The remainder of our discussion will focus on the inquiry of whether that appeal can be constitutionally disposed of without providing the petitioner with a free hearing transcript.

II

THE IOWA RULES OF PROCEDURE APPLICABLE TO PREPARING A RECORD FOR AN APPEAL FROM THE DENIAL OF A HABEAS ACTION ARE FLEXIBLE AND IT CANNOT BE ASSUMED THAT AN INDIGENT HABEAS APPELLANT WILL BE DENIED ADEQUATE REVIEW UNLESS HE IS FURNISHED A FREE COPY OF THE HEARING TRANSCRIPT. MOREOVER, BEFORE SUCH AN APPELLANT CAN COMPLAIN THAT HE HAS BEEN DEPRIVED OF A CONSTITUTIONAL RIGHT UNDER THE FOURTEENTH AMENDMENT HE MUST MAKE SOME ATTEMPT TO DEMONSTRATE HIS INABILITY TO WORK WITH THESE RULES AND THE RESULTING NEED FOR A FREE TRANSCRIPT.

The petitioner's application to the Iowa trial court (R. p. 34) and his petition for a writ of certiorari filed with the

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[5]As stated in note 3, supra, a trial court's judgment denying a habeas petition is appealable, as of right, to the Iowa Supreme Court. In this respect, the State concedes that the petitioner filed a timely and proper notice of appeal (R. p. 32), with the result that the Iowa Supreme Court obtained jurisdiction to review the lower court's denial of his habeas petition (cf. Rules 335 and 336, Rules of Civil Procedure, 1962 Code of Iowa, Vol. 2, p. 2692). Short of a disposition on the merits, it is contemplated that an appeal can be disposed of by specified action on behalf of the appellee or by the Iowa Court on its own motion where the appellant's record has not been filed within the time permitted by the rules (Rule 342 (c) and (d), supra, p. 2694). The appellee, here the State, its counsel the Attorney General, has taken no action to obtain a dismissal of Long's appeal for failure to file a timely record. Moreover, the Iowa Court will not dismiss an appeal on its own motion where "reasonable excuse be shown for . . . failure to comply with these rules" (Rule 342 (d), supra), and we suppose it is beyond question that "reasonable excuse" exists where the appeal is held up, as it is here, pending a decision on a constitutional question applicable to the appeal by the United States Supreme Court. Accordingly, the petitioner still has an appeal pending before the Iowa Court, the disposition of which is stayed until the outcome of this certiorari action.

Iowa Supreme Court (R. pp. 38-40) contain the conclusory allegations that the hearing transcript "is necessary to prepare an adequate record with which to prosecute an effective appeal" and that without the transcript he is "foreclosed from pursuing all phases of his appeal, other than the mere filing of his intention to [do so]." In response to these allegations, we admit that a copy of the habeas hearing transcript would no doubt be helpful in most appeals but we are not ready to concede, as the Attorney General did in *Griffin* v. *Illinois,* 351 U.S. at 16, that the petitioner "needs a transcript . . . to get adequate appellate review."[6]

This Court is aware that a substantial number of in forma pauperis criminal appeals are frivolous, cf. *Douglas* v. *California,* 372 U.S. 353, 359, note 1 (dissenting opinion), and *Griffin* v. *Illinois,* 351 U.S. 12, 24 (concurring opinion). And, while we shall make no attempt to proffer statistics as to the percentage of frivolous appeals in post conviction proceedings, we suppose the number is overwhelming. This does not mean, of course, that in forma pauperis post conviction appeals are to be arbitrarily denied or diluted to meaningless proceedings because of poverty, cf. *Lane* v. *Brown,* 372 U.S. 477, 485, and *Coppedge* v. *United States,* 369 U.S. 438. On the other hand, where a State not only gives leave for appellate corrections of errors but must pay for the cost of its exercise by indigents, "it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin* v. *Illinois,* 351 U.S. 12, 24 (concurring opinion). This principle

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[6]Our refusal to make this concession rests not alone upon the premises to be advanced in this division of the Argument but also upon the proposition tendered in the third division of our Argument, infra, pp. 19-24, to the effect that there is available for the appeal, apart from the hearing transcript, record material even more relevant to the merits of the contentions set forth in Long's petition for a writ of habeas corpus.

opposing needless expenditure is indelibly written in this Court's decisions and cannot, as the petitioner supposes, be erased by conclusory assertions as to a denial of equal protection or due process. As the Court put it in *Griffin*:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." (351 U.S. at 20).

The principle was reaffirmed in *Eskridge* v. *Washington State Board,* 357 U.S. 214, 216 and again very recently in *Draper* v. *Washington,* 372 U.S. 487, 495. In *Draper,* the Court noted that alternative methods of making up a record for the appeal are permissible provided they accord adequate review. In this connection, the Court made the following observations:

> "A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes . . . might all be adequate substitutes, equally as good as a transcript." (372 U.S. at 495).[7]

The question then as we would frame it, is whether Iowa provides alternative methods for obtaining an adequate appellate record, which methods do not require, as indispensible thereto, a hearing transcript? Appeals from the denial of a petition for a writ of habeas corpus are governed procedurally by the Iowa Rules of Civil Procedure, 1962 Code of Iowa, Vol. 2, pp. 2645-2699 (hereinafter cited only

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[7]In addition to the alternative methods suggested in *Draper* for making up a record, where the appeal is from the denial of a post conviction remedy and the attack is as to things which allegedly occurred at the criminal trial the transcript recording that trial, if available, may itself be the more relevant record for the appellate court to review, infra, pp. 19-24.

by reference to the Rule in issue). The applicable Rules to be now considered are set forth in full in Appendix "A".

One Method:

Rule 340 (a)-(h), Appendix "A", infra, pp. A-1-A3, provides the most commonly followed means for obtaining the record for civil appeals to the Iowa Supreme Court. Subsection (a) states that promptly after taking an appeal the appellant shall file with the trial court a duplicate typewritten "abstract of so much of the record in that court . . . as is material to the appeal", at which time the "reporter's transcript shall [also] be filed." Rule 340 (b) provides that if the abstract does not embrace the whole record, including exhibits or references thereto, it shall include a concise statement of the points to be relied upon on appeal. Rule 340 (c) directs that within 20 days, unless an extension of time is allowed, any other party to the appeal may, in like manner, file duplicate amendments, proposed corrections, substitutions or additions to the proposed abstract of record. The Rule further provides that at the expiration of the time for amendment either party, on not less than three days written notice, may present the proposed abstract and all proposed amendments to the judge who tried the case *"who shall settle any differences to the end that the abstract correctly shows the evidence and proceedings at the trial,"* after which the judge shall append to the proposed abstract an order settling the same (Emphasis added). . Rule 340 (f) states that the abstract so allowed shall constitute the record for appeal and the appellant shall cause it to be printed. As an alternative to this procedure, Rule 340 (h) provides that the parties may file with or include in the proposed abstract "their written agreement that it is correct [and] the trial judge

shall thereupon certify that such abstract has been so agreed to, and is the record on appeal."[8]

We ask the Court to assume for a moment that resort to the record making procedures of Rule 340 (a)-(h) does not require that "the reporter's transcript be filed at the same time" as the appellant's typewritten manuscript of the proposed abstract. Predicated on this assumption, an appellant is in a position to include in a manuscript a narrative statement of the evidence as he believes it to be shown in the reporter's notes, together with the pleadings, orders and judgment.[9] If the other party disagrees with the accuracy of the proposed abstract it has the burden to amend the same. In any event, where there is a dispute as to the proposed record the trial judge is enjoined to settle the record to the end that *"the abstract correctly shows the evidence and proceedings at the trial."* In this respect, the Court's duty is not discretionary; the rule says he "shall" settle the record. Moreover, Section 605.7 of the 1962 Code of Iowa specifically provides that the trial judge's official court reporter shall, in addition to reporting trials, "perform such other . . . related duties in aid of the court as the judge who appointed him may direct." It is, we think, not unfair to assume that an

[8]Prior to the adoption of Rule 340 in 1943, Iowa Acts, 50 G.A., Ch. 278, the appellant's abstract of record was submitted to the Supreme Court with his brief and was presumably the true version of the trial record unless denied or corrected by the appellee's subsequent abstract, Iowa Acts, 42 G.A., Ch. 231, §1 (1927). Costs were taxed to any party filing a denial or abstract without good and sufficient cause. The record under this system came to the Supreme Court as a jigsaw puzzle; hence it became desirable to settle the record in the trial court under supervision of the trial judge with a single document being sent to the Supreme Court, see 4 Cook, Iowa Rules of Civil Procedure 199-200 (rev. ed. 1951). See also, Note, Form of Appellate Record in Iowa, 48 Iowa Law Rev. 77 (1962).

[9]As to pleadings, orders and judgments, there is certainly no argument that petitioner Long was deprived of these (R. pp. 15-27, 28, 29, 30-31, 33, 34-35, 36, 37, 38-42 and 43-44).

Iowa trial judge will execute his obligation to settle a record even to the extent, where necessary, of directing his court reporter to help him by reading back all or a relevant portion of the shorthand report of the trial, cf. *Draper* v. *Washington*, 372 U.S. at 495. Finally, there is the further possibility that under Rule 340 (h) the parties will agree that a proposed abstract is correct, in which case the trial court must certify the same as the record.

As we view Rule 340, subsections (a) through (h), it is certainly arguable that an adequate record can be obtained by an indigent appellant despite his poverty. The petitioner complains, however, that any resort to these procedures would be frustrated at the outset because he is required to file the very thing he cannot obtain—the trial transcript (brief, pp. 9-10). His argument is long on sympathetic response but short on research. Rule 371, Appendix "A", p. A4, clearly provides that the Supreme Court of Iowa "shall have the power to revoke, change or supplement . . . any rule in division XVI hereof except rules 331-339 inclusive." Rule 340 is in "division XVI" of the Rules.

Thus, the Iowa Court has the authority to "change" the requirement of filing the reporter's transcript under Rule 371 and since the petitioner cannot purchase the transcript which the trial court will not furnish free, it would indeed be a heartless appellate court that would say to the petitioner: "we recognize your right to appeal, the fact that you are poor, and our power to facilitate you, but we will not allow you to resort to Rule 340 unless you buy a transcript and file it." We can ascribe no such cold blooded approach to the Iowa Supreme Court. As we have pointed out in the first division of our argument Long still has an appeal pending before the Iowa Court from the denial of his habeas action and if he desires to resort to Rule 340

procedures for obtaining an appellate record it is a foregone conclusion that the "transcript filing requirement" will be suspended.

In the latter connection, since *Smith* v. *Bennett*, 365 U.S. 708, the Iowa Court has, as a matter of course, upon the request of an indigent habeas appellant, dispensed with the more stringent rules of appellate procedure such as the printing of records and briefs, the required number of copies of each, the nonjurisdictional time requirements, etc. Such suspension of the rules is attested to by numerous unreported judgments entered on behalf of indigent prisoners seeking appeals. We have set forth in Appendix "B", as illustrative, three such applications and the judgments entered thereon.

Another Method:

Rule 340 (J) presents a second method by which an appellant may be successful in making up an adequate record for review. The Rule contemplates that the parties may agree to a statement of the record and when the same is approved by the trial court it shall be the record on appeal.

In view of the foregoing discussion we think it not incorrect to state that the Iowa Rules of Procedure are flexible and while the petitioner has been denied a free hearing transcript we are not prepared to say that Iowa has failed to provide other means by which an indigent appellant could obtain an adequate record for effective review. The petitioner will probably agree that as an abstract proposition this statement is correct but then request the Court to break the promise of *Griffin*, *Eskridge*, and *Draper* because as a practical matter he lacks the wherewithal to

cope with the Rules of Procedure.[10] We shall answer such a contention though it is not articulated in his brief.

Obviously, not every indigent prisoner seeking an appeal has the ability to cope with the procedural rules relative to obtaining a record for appellate review, nor does the observation stop there. Given a free hearing transcript some indigent prisoners will lack even the rudimentary skills necessary to use it meaningfully. These are questions, however, which are irrelevant to the present record unless the Court is willing to judicially notice Long's inability. Both the record and the petitioner's brief contain only conclusory allegations that he needs the transcript to obtain adequate appellate review. The State, he says, has denied me due process and equal protection of the laws by refusing to give me a free hearing transcript. This is, of course, a serious charge and we think it neither unfair nor hard-nosed for the State to insist that the petitioner share some burden of establishing the denial of a constitutional right. As we read the cases, it is incumbent upon the petitioner in a habeas corpus proceeding to produce some proof that he has been denied a constitutional right, *Moore* v. *Michigan,* 355 U.S. 155, 161; *Hawk* v. *Olson,* 326 U.S. 271; *Johnson* v. *Zerbst,* 304 U.S. 458. Placing some burden on the petitioner in the context of the instant case doesn't mean he need be subjected to prolong delay before an adjudication of the merits of the appeal. If the Court agrees that the Iowa Rules of Civil Procedure provide a possible means for obtaining an ade-

[10]If the state appeal is meaningless, as the petitioner claims, we think such factor results not so much from the lack of a free hearing transcript but rather because of his inability to work with the rules discussed in the text. This observation in no way detracts from the proposition that Iowa provides alternative means of obtaining an adequate record for review, though it does point up the desirability of counsel in a given case. Such is, of course, not an issue here.

quate appellate record, its disposition of this case can assure the petitioner protection if he lacks the ability to utilize the rules.

III

WHERE AN INDIGENT PRISONER FILES A PETITION FOR A WRIT OF HABEAS CORPUS ATTACKING THE LEGALITY OF CONFINEMENT BECAUSE OF THINGS THAT ALLEGEDLY OCCURRED DURING THE CRIMINAL PROCEEDINGS, A TRANSCRIPT OF THE HABEAS HEARING WILL NOT BE NECESSARY TO OBTAIN ADEQUATE APPELLATE REVIEW OF THE DENIAL OF THE PETITION WHERE A TRANSCRIPT OF THE CRIMINAL PROCEEDINGS IS AVAILABLE AND PRESENTS A SUFFICIENT BASIS FOR ADEQUATE REVIEW OF THE CONTENTIONS RAISED IN THE HABEAS ACTION. MOREOVER, THE SUPREME COURT OF IOWA DOESN'T NEED A HABEAS HEARING TRANSCRIPT TO INFORM THEM WHAT THEIR OWN RECORDS REFLECT OR FAIL TO REFLECT.

In *Draper* v. *Washington*, 372 U.S. 487, 495, the Court noted the possibility of specific alternative methods of according an indigent defendant adequate review of the criminal judgment without furnishing a free copy of the criminal trial transcript. This case presents the opportunity for the Court to further consider this principle in the context of an appeal from a post conviction proceeding with the distinct possibility that a transcript of the criminal proceedings could present an even more relevant basis for adequate review than resort to a transcript of the post conviction hearing. Thus, for example, where the petitioner in a post conviction proceeding contends that an incriminating admission was introduced at the criminal trial in violation of the Self-Incrimination Clause of the Fifth Amendment, the most obvious source to confirm the validity of the contention would be a report of the criminal trial. Moreover, where a petitioner complains of things that allegedly happened or should have happened in con-

nection with a direct appeal from a criminal judgment, the Supreme Court of Iowa doesn't need a transcript of a post conviction hearing to inform it what its own records reflect. The applicability of these propositions to the instant litigation can be demonstrated by considering the petitioner's contentions as to how his present confinement is unlawful.

Lawrence Long's petition for a writ of habeas corpus contains five distinct allegations as to how his present confinement is illegal. We shall discuss each separately and offer comments which we believe relevant to the question presented here.

1. As the record reflects (R. p. 1), Long was brought before Justice of the Peace W. E. Miner for a preliminary hearing at which time he "entered a plea of Guilty." He contends, and we have so conceded in our Statement, supra, p. 2, that he was not at this time represented by counsel. In his petition for habeas relief he alleges that this admission of guilt was introduced at the criminal trial, which introduction violated his constitutional rights (R. pp. 16, 18, 24). If the admission of guilt was introduced as alleged he probably is entitled to relief in habeas corpus under *White* v. *Maryland*, 373 U.S. 59.[11] The point is that the petitioner doesn't need a copy of the habeas hearing transcript to present the *White* v. *Maryland* argument to the Iowa Court if the transcript of the criminal trial is available for review.

2. The petition for habeas relief also alleges that Long's criminal trial counsel was incompetent "due to [the] lack

[11]On October 5, 1964, the Attorney General of Iowa ruled (1964 O.A.G. 160) that while it is not the normal function of a magistrate at a preliminary hearing to receive pleas of guilty, such a plea may be introduced at the trial as an admission of guilt and that, accordingly, *White* v. *Maryland* is applicable to Iowa preliminary hearings.

of time said Attorney had to prepare petitioner's defense" (R. pp. 17, 24). In this connection, the petition states (R. p. 25) "[T]he competence of petitioner's Court-Appointed Attorney is challenged . . . and the question of competence here goes only to said . . . Attorney's conduct and action in representation of petitioner in his criminal trial . . .". Obviously, the most relevant means of reviewing this contention would be to look at a report of the criminal trial proceedings.

3. The petition alleges that he was denied an effective appeal from the criminal judgment in that his court appointed attorney failed to file a brief on the merits and permitted the appeal to be disposed of in the Supreme Court of Iowa on a Clerk's Transcript (R. pp. 17, 25).[12] The Iowa Supreme Court doesn't need a habeas hearing transcript to review this contention since its own records will reflect the accuracy of the argument. As a matter of fact, the records of the Supreme Court of Iowa reveal that on March 17, 1964, Long's attorney, Harold B. Heslinga, caused to be filed in *State* v. *Long*, Criminal Appeal No. 51355, an abstract of record; that on April 30, 1964, the same attorney filed a brief with the Court; and that on May 29, 1964, the same attorney presented an oral argument in the case (see Appendix "C", infra, pp. C1). Even if what the petitioner really means is that his attorney didn't brief all of the possible errors occurring at the trial or failed to competently handle those presented in the brief, such a contention could be adequately reviewed in the post conviction appeal by looking to a report of the criminal proceedings.

---

[12]The Iowa Court's Rules relative to criminal appeals provide that if the appellant's abstract of record is not filed within ninety days after the notice of appeal the appeal will be disposed on the basis of the so-called "Clerk's Transcript" (Supreme Court Rule 15, 1962 Code of Iowa, Vol. 2, pp. 2715-2716). The clerk's transcript in Iowa is the equivalent to the "mandatory record" discussed in *Griffin* v. *Illinois*, 351 U.S. 12, 13, at note 2. The contention posed in the text to this note is a question pending review before this Court in *Entsminger* v. *Iowa*, No. 98, Oct. Term, 1966.

4. As a further ground for relief, the petition alleges that Long was denied the opportunity to consult with an attorney during the course of a police interrogation with the result that the introduction at the trial of incriminating statements elicited by the interrogation "constitutes a denial of the 'Assistance of Counsel' in violation of [the] Sixth Amendment" (R. p. 17). Here again, the criminal trial transcript may be most adequate as a basis to review this contention, particularly to ascertain if any such statements were introduced and to see, for example, if the defendant denied making any such statements. As to this contention, however, there is an even more important reason why the petitioner does not need a hearing transcript for its disposition. *Johnson* v. *New Jersey*, 86 S. Ct. 1772, decided June 20, 1966, holds that *Escobedo* v. *Illinois*, 378 U.S. 478, decided on June 22, 1964, is available only to those persons whose trials began after the date of that decision. Long's trial commenced and was completed in October, 1963 (R. pp. 7-8).

5. The final contention in Long's habeas petition is that he was held in jail for six months pending trial on the criminal charge and thereby deprived of his constitutional right to a speedy trial (R. pp. 16, 24). This was the main issue considered in *State* v. *Long*, 256 Iowa 1304, 130 N.W.2d 663, where the Iowa Court found it regretable that defendant was confined for so long prior to trial but affirmed the conviction. The procedural steps taken to secure Long's release because of this confinement are set forth in the Court's opinion and the facts surrounding such confinement are of record in that Court. One might argue that the Iowa Court erred as a matter of law in rejecting the "speedy trial" issue but a habeas hearing transcript is not needed to make the argument.

As the Court noted in *Smith* v. *Bennett*, 365 U.S. 708, 711, Iowa provides free trial transcripts to indigent defendants seeking direct appeal of criminal judgments. Since Lawrence Long had such an appeal it can be assumed that he was provided such a transcript. In point of fact, Long was furnished a free trial transcript which is still available, a copy is lodged with the Attorney General and a copy is a part of the files of the official court reporter of the Mahaska County District Court (see Appendix "C", infra, pp. C2, C3). It appears that the criminal trial transcript was not in evidence in the Lee County, Iowa, post conviction proceeding and, accordingly, is strictly speaking, not a part of the record. This doesn't necessarily mean that the Iowa Supreme Court cannot look at such transcript in disposing of the habeas appeal. In this connection, we are told that the records of this Court will reflect that the criminal trial transcript involved in *Gideon* v. *Wainwright*, 372 U.S. 335, was not a part of the formal record [illegible]dered up to the Court, but one must certainly admit that the trial transcript played a significant role in the decision, 372 U.S. at 337.

Though the important point is not whether the Iowa Court can look at the trial transcript but rather if it can, does such provide a means of affording adequate review, we see nothing to prevent resort to the criminal trial transcript if it will aid a proper disposition of the appeal. The Iowa Constitution, Art. V, §4, provides that the Supreme Court of Iowa to effectuate its appellate jurisdiction "shall have power to issue all writs and process necessary to secure justice to [the] parties and exercise a supervisory control over all inferior judicial tribunals throughout the State." As we have already noted, supra, p. 16, Rule 371 of the Iowa Rules of Civil Procedure authorizes the Supreme Court to "change or s[illegible]plement" those rules

dealing with the procedural requirements of preparing and bringing before that Court a record to dispose of an appeal. Finally, Rule 341 specifically provides that the Supreme Court on its own initiative or proper suggestion can cause "further proceedings to be had and a supplemental record . . . prepared and certified in the trial court . . ." Accordingly, we have no doubt that the Iowa Court can look to the criminal trial transcript to dispose of the petitioner's contentions and if we are successful here we intend to ask that Court to do so.

CONCLUSION

For the foregoing reasons the State respectfully submits that there exists in Iowa alternative methods by which the petitioner can obtain adequate review of the merits of the post conviction proceeding without furnishing him a free hearing transcript and we request that the judgment of the Supreme Court of Iowa be affirmed.

LAWRENCE F. SCALISE
Attorney General of Iowa

DON R. BENNETT
Assistant Attorney General
State House
Des Moines, Iowa
Attorneys

SEPTEMBER, 1966

APPENDIX A

(Constitutional and Statutory Provisions)

The Iowa Constitution, Article V, Sec. 4, provides in pertinent part as follows:

> "The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have the power to issue all writs and processes necessary to secure justice to parties and exercise a supervisory control over all inferior judicial tribunals throughout the state."

The Iowa Rules of Civil Procedure, 1962 Code of Iowa, Vol. 2, pp. 2645-2699, provide in pertinent part as follows:

> "340. Record on appeal.
>
> "(a) Promptly after taking an appeal to the supreme court, appellant shall file with the clerk of the trial court duplicate typewritten abstract of so much of the record in that court, including pleadings, evidence, rulings, orders, judgment and all proceedings in the case, as is material to the appeal. Where exhibits will be copied in full in the printed record, the abstract may so state and refer to them by letter, number or other appropriate designation, without copying them.
>
> "The reporter's transcript shall be filed at the same time; and these rules relative to it shall also apply to bills of exceptions under rule 241. The cost of the transcript shall be taxed in the trial court.
>
> "The clerk shall forthwith notify the attorneys of record for the appellee of such filing.
>
> "(b) If the abstract does not embrace the whole record, and all evidence and proceedings in the transcript, depositions and exhibits, it shall include a concise statement of all points upon which appellant will rely on the appeal, which shall be limited thereto.

"(c) Within twenty days after such filing, or such longer time as the trial court may allow or the parties agree to in writing, any other party to the appeal may, in like manner, file duplicate amendments to appellant's abstract, proposing corrections, substitutions or additions thereto. At the expiration of the time for amendment, either party, on not less than three days written notice may present the proposed abstract and all such proposed amendments, if any, to the judge before whom the case was tried, who shall settle any differences to the end that the abstract correctly shows the evidence and proceedings at the trial, and is in form as provided by these rules. The trial court shall then append to appellant's proposed abstract an order settling the same with any corrections, substitutions or additions it has allowed in conformity with these rules.

"(d) If a party to the appeal shows the trial court a good reason for setting out part of the testimony in question and answer form, such part may appear by questions and answers. If this is not done, testimony of witnesses shall be abstracted in condensed or narrative form.

"(e) Formal parts of all exhibits, and more than one copy of any document, shall be omitted. Documents shall be abridged by omitting formal or irrelevant parts. This rule shall also apply to exhibits to pleadings.

"(f) The abstract allowed as above or under paragraph (h) hereof shall constitute the record on which the cause shall be submitted on the appeal. The appellant shall cause it to be printed, so as also to contain in full any exhibits designated in the abstract by number alone, as provided in paragraph (a) hereof.

"(g) The supreme court may impose or withhold costs for any addition or substitution of irrelevant matter, or the use of needless questions and answers for the narrative statement. To aid it in this respect only,

the clerk of the trial court, at the request of the aggrieved party, shall certify to the supreme court the reporter's transcript, depositions, exhibits and proposed abstract and amendments thereto.

"(h) Instead of proceeding under paragraphs (b) and (c) hereof, the parties may file with or include in the abstract proposed by any party to the appeal, their written agreement that it is correct. The trial court shall thereupon certify that such abstract has been so agreed to, and is the record on appeal.

"(i) Abstracts and the printed record shall contain a brief index of their contents, in which the pleadings shall appear in the order of their filing.

"(j) Agreed record. Instead of proceeding under the foregoing paragraphs (a) to (f) the parties may, promptly after taking an appeal, present for his approval to the judge before whom the case was tried, or if he is not available to any other judge of the same court, an agreed record on appeal. It shall show how the questions arose and were decided in the trial court. It shall either set out so much of the facts pleaded or proved as are necessary to a decision of such questions and to proper disposition of the appeal, or contain an abstract of the relevant proceedings which will enable the supreme court to decide the appeal. It shall include an abstract or copy of the judgment or order appealed from and a brief index of contents. Such agreed record, when approved by said judge, shall be the record on appeal and the appellant shall cause it to be printed, filed with the clerk of the trial court and transmitted to the clerk of the supreme court in accordance with rule 342."

"341. Correcting record—certification.

"(a) If anything material to either party is omitted from the record on appeal by error or accident, or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is trans-

mitted to the supreme court, or the supreme court on its own initiative or proper suggestion, may direct the correction thereof; and, if necessary, that further proceedings be had and a supplemental record be prepared and certified in the trial court; or may require the clerk of the trial court to certify to the supreme court any or all of the evidence or proceedings below.

"(b) Any part or all of the record, including exhibits, in the trial court shall, at the request of the supreme court or any justice thereof, be certified and transmitted by the clerk of the court below to the supreme court."

* * *

"371. Power of supreme court to change.

"The supreme court shall have power to revoke, change or supplement any of these rules which prescribe the procedure in that court. Under this power the court may revoke, change or supplement any rule in division XVI hereof except rules 331-339 inclusive. Any such change or addition shall take effect at such time as the court shall prescribe."

FILED
JAN 29 1964
HELEN M. LYMAN
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

DALE MILTON BUTEAUX,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN,
Iowa State Penitentiary,
Fort Madison, Iowa,
Respondent.

APPLICATION FOR LEAVE TO APPEAL IN FORMA PAUPERIS, AND FOR LEAVE TO FILE TYPEWRITTEN RECORDS AND BRIEFS

TO: THE SUPREME COURT OF IOWA

Comes now Dale Milton Buteaux, petitioner, in the above entitled cause, and respectfully request that the following request prayed for be granted by this Honorable Court.

1. That petitioner in the above entitled cause, be allowed leave to proceed with an appeal in habeas corpus, in forma pauperis, in which notice of appeal has been made on January 28th, 1964, to the Lee Dist. Court, at Fort Madison, Iowa, denying the writ on January 10th, 1964.

Petitioner's Motion to Proceed in Forma Pauperis, and Affidavit of Poverity is attached hereto in support of said request.

2. That petitioner in the above entitled cause, be allowed leave to use typewritten records and briefs in his habeas corpus appeal

Petitioner request that the Court, inform him as to the number of typewritten copies is required, should leave be granted.

WHEREFORE, petitioner prays that this Honorable Court will grant the request asked for in this cause, and petitioner will for ever pray.

Respectfully submitted

Dated January 28th, 1964.

Dale Milton Buteaux
No. 27357, Box-316
Fort Madison, Iowa.
Petitioner.

FILED
FEB 3 1964
ELLEN M. LYMAN
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

DALE MILTON BUTEAUX, Petitioner,)
)
v.)
)
JOHN E. BENNETT, Warden, Iowa State) ORDER ON APPLICATION
) AND MOTION
Penitentiary, Fort Madison, Iowa,)
)
Respondent.)

The application and motion filed by appellant Dale Milton Buteaux herein on January 29, 1964, have been duly considered and the order thereon is as follows:

The appeal is to be docketed without payment of filing fee or other costs.

The appeal may be submitted on typewritten record and briefs, six copies of which shall be filed.

DONE this 31st day of January, 1964.

THE SUPREME COURT OF IOWA

Chief Justice

Take 4 cert copies.

B2

FILED
JUN 5 1964
HELEN M. LYMAN
CLERK SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF IOWA

JACK H. HOSKINS

APPELLANT

VS.

JOHN E. BENNETT, WARDEN
Iowa State Penitentiary
Fort Madison, Iowa

APPELLEE

General No. _____

APPLICATION FOR LEAVE TO PROCEED WITHOUT PAYMENT OF COSTS OR FEES AND FOR LEAVE TO USE TYPWRITTEN RECORDS, BRIEFS AND ARGUMENTS ON THE APPEAL IN THIS CAUSE

B3

STATE OF IOWA)
(SS
COUNTY OF LEE)

Comes now Jack H. Hoskins, Appellant above-named, upon appeal to the Supreme Court of Iowa from the judgements of the Lee County District Court, in Cause No. 13680 and states the following:

FILED
JUN 5 1964
HELEN M. LYMAN
CLERK SUPREME COURT

1. Appellant is an inmate of the Iowa State Penitentiary, Fort Madison, Iowa, and has filed timely notice of appeal from adverse judgements denying him relief in a habeas corpus action.

2. Appellant is without means to obtain sufficient funds to pay the usual costs and fees, or to pay for the printing of the Abstract of Record, Briefs and Arguments, which are required to prosecute his appeal in this Court.

3. Appellant believes that he is entitled to the relief sought in the habeas corpus proceeding below, and in the review of the District Court's judgement in this Court.

4. The record in this cause is lengthy, the Proposed Abstract consisting of 119 typewritten pages.

WHEREFORE, Appellant requests permission to proceed without payment of the usual costs and filing fees, and to submit the case upon four (4) typewritten copies of Abstract of Record, and four (4) typewritten copies of Appellant's Brief and Arguments.

Respectfully,

Jack H. Hoskins

Jack H. Hoskins 26190
Box 316
Fort Madison, Iowa

Subscribed and sworn to before me this 4 day of June A.D., 1964 in my office at Fort Madison, Lee County, Iowa.

Ralph D. Moehn

Ralph D. Moehn
Notary Public and for
Lee County, Iowa

My commission expires July 4, 1966.

FILED
JUN 18 1964
HELEN M. LYMAN
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

B4

JACK H. HOSKINS, Appellant,)
)
v.)
)
JOHN E. BENNETT, Warden, Iowa State Penitentiary, Fort Madison,) ORDER ON APPLICATION
)
Appellee.)

Appellant's application filed June 5, 1964, was considered by the court and IT IS ORDERED that he be permitted to file the record and briefs and arguments herein without payment of filing fee or other costs.

IT IS FURTHER ORDERED that the appeal be submitted on typewritten copies of the record, briefs and arguments, and that six copies of each shall be filed.

DONE this 11th day of June, 1964.

THE SUPREME COURT OF IOWA

H. G. Garfield
Chief Justice

Copy has been mailed to appellant.

IN THE SUPREME COURT OF IOWA

JAMES E. HARLESS	*	General No. 51736
APPELLANT	*	APPLICATION FOR LEAVE TO USE TYPEWRITTEN RECORDS, BRIEFS AND ARGUMENTS ON THE APPEAL IN THIS CAUSE
VS.	*	
JOHN E. BENNETT, WARDEN Iowa State Penitentiary Fort Madison, Iowa	*	
APPELLEE	*	

B5

STATE OF IOWA)
COUNTY OF LEE)

Comes now James E. Harless, Appellant above-named, upon appeal to the Supreme Court of Iowa from the judgments of the Lee County District Court, in Cause No. 13897 and states the following:

1. Appellant is an inmate of the Iowa State Penitentiary, Fort Madison, Iowa, and has filed timely notice of appeal from adverse judgments denying him relief in a habeas corpus action.

2. Appellant is without means to obtain sufficient funds to pay for the printing of the Abstract of Record, Briefs and Arguments, which are required to prosecute his appeal in this Court.

3. Appellant believes that he is entitled to the relief sought in the habeas corpus proceeding below, and in the review of the District Court's judgment in this Court.

WHEREFORE, Appellant requests permission to submit the case upon typwritten copies of the Abstract of Record, and ~~one~~ typwritten copies of the Appellant's Brief and Arguments.

Respectfully,

James E. Harless

James E. Harless, 24344
Box 316
Fort Madison, Iowa

Subscribed and sworn to before me this 5 day of February A.D., 1965 in my office at Fort Madison, Lee County, Iowa.

Ralph D. Noem

RALPH D. NOEM
Notary Public in and
for Lee County, Iowa

My commission expires July 4, 1966.

FILED
APR 7 - 1965
HELEN M. LYMAN
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

B6

JAMES E. HARLESS,

Appellant,

v.

JOHN E. BENNETT, WARDEN
Iowa State Penitentiary
Fort Madison, Iowa

ORDER AUTHORIZING TYPEWRITTEN RECORD AND BRIEFS

NOW on this 7th day of April, 1965, it is hereby ordered that plaintiff may file 9 copies of his typewritten record and briefs, in lieu of printed record and briefs, to be used by the court upon submission of the appeal in this case.

SUPREME COURT OF IOWA

By T. G. Garfield
CHIEF JUSTICE

74
4-7-65

Clerk of Supreme Court

HELEN M. LYMAN
CLERK

STATE OF IOWA
Des Moines

TEL. 281-5911

September 8, 1966

Mr. Dom R. Bennett
Assistant Attorney General
State of Iowa
Des Moines, Iowa

Re: State v. Lawrence Long
Supreme Court Criminal
Appeal No. 51355

Dear Mr. Bennett:

This is to advise you that a check of our records reveal the following:

1. On March 17, 1964, Lawrence Long's attorney, Harold B. Heslinga, Oskaloosa, Iowa, caused to be filed in my office the necessary copies of the appellant's printed abstract of record.

2. On April 30, 1964, Mr. Heslinga caused to be filed in my office the necessary copies of the appellant's brief and argument and our records indicate that a copy of the same was served on the Attorney General.

3. On May 29, 1964, the Attorney General for the State of Iowa caused to be filed in my office the necessary copies of the State's denial of and amendment to the appellant's abstract of record and its brief and argument. Our records further reflect that on September 23, 1964, the case was presented to the Supreme Court of Iowa on Oral Argument, Heslinga and Heslinga presenting the argument for Lawrence Long.

Yours very truly,

Helen M. Lyman

Clerk of Supreme Court

THE OFFICE OF
LAKE E. CROOKHAM
MAHASKA COUNTY ATTORNEY
OSKALOOSA, IOWA
Telephone 673-7014

September 8, 1966

Don Bennett
Attorney General's Office
State Capital Building
Des Moines, Iowa

C2

Dear Mr. Bennett:

Please be advised that I did on this date contact the Clerk of the District Court of Mahaska County, Iowa, and LeRoy Peterson, Court Reporter for the Honorable Harold Fleck, Judge of the District Court, concerning the possession of a transcript of the evidence of the case of the State of Iowa virus Lawrence Long, in Criminal Docket 4 at Page 234. This is to advise you that there is not a copy of the transcript filed in the Clerk's office, however, there are three copies in existance; one of which was delivered at State expense to the Defendant's attorney of record, Harold Heslinga of Oskaloosa, Iowa, one copy delivered at State expense to the Attorney General's Office, and a third copy retained by LeRoy Peterson in his files in the reporters office in the Court courthouse in Oskaloosa, Mahaska County, Iowa. The said copy retained by LeRoy Peterson is the copy retained by him and is available for inspection and examination by any person interested in this matter.

Mr. Peterson advised me that no person had requested nor indicated a desire to see or examine the transcript kept by him in the courthouse.

Sincerely yours,

Lake E. Crookham
Mahaska County Attorney

LEC/cjb

LAW OFFICES
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GAROLD F. HESLINGA
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TELEPHONE 673-8459

September 8, 1966

C3

Mr. Don Bennett
Assistant Attorney General
Department of Justice Annex
1217 Walnut Street
Des Moines, Iowa

Dear Mr. Bennett:

Enclosed find a copy of a letter written by me to Lawrence Long on the 2nd day of November, 1964. I was no longer in the employment of Mr. Long on such date and in my opinion, no attorney-client relationship then existed.

Also enclosed find a copy of the cross examination of Mr. Long by the Mahaska County Attorney. As indicated by my letter of November 2, 1964, a copy of such enclosure was sent to Mr. Long. The original of the trial transcript is and has at all times been in my possession.

Yours very truly,

/Harold B. Heslinga

Harold B. Heslinga

HBH:bng

Encs.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 77

LAWRENCE LONG,

Petitioner,

—vs.—

THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

REPLY BRIEF FOR PETITIONER

RONALD L. CARLSON
College of Law
University of Iowa
Iowa City, Iowa
Counsel for Petitioner

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THE DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY, FORT MADISON, IOWA.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

A. Conditioning Habeas Corpus Rights on Ability to Pay Deprives Indigent Prisoners of Equal Protection of the Law.

The indigent prisoner is denied equal protection of the law when financial hurdles are discriminately interposed to condition the exercise of habeas corpus rights. This is exactly what has occurred in the case at bar. By requiring the petitioner to buy a transcript if he desires meaningful appeal, which purchase petitioner lacks funds to make, he is effectively foreclosed from full appellate review in habeas corpus. *Lane* v. *Brown*, 372 U.S. 477 and *Smith* v.

Bennett, 365 U.S. 708, specifically prohibit the imposition of hurdles based upon capacity to pay which impair the indigent prisoner's ability to exercise rights accorded petitioners with financial means.

Discrimination based upon poverty exists in the instant case where the kind of appeal a man enjoys depends upon the amount of money he has. Petitioners with means can obtain a hearing transcript and receive full appellate review of their habeas corpus trial. This is denied petitioner.

The need for a transcript to obtain full appellate review was recognized by the state legislature which established a statutory right to a trial transcript in criminal causes in Iowa. Section 793.8, Iowa Code (1962). The Supreme Court of Iowa has stated that the furnishing of a transcript is required to afford the indigent defendant an adequate appeal from his conviction. *Weaver* v. *Herrick,* 140 N.W. 2d 178, 181 (Iowa 1966). The court did not suggest that alternates or substitutes for a transcript existed under Iowa procedure to assure indigents the same appeal rights as defendants with means. Instead, the court announced that a stenographic transcript is called for to provide full appellate review in Iowa.

Notwithstanding this reasoning, the respondent suggests that alternatives to a stenographic transcript are available to the petitioner. While none of respondent's suggestions afford petitioner the means to present an adequate appeal record, they will be dealt with specifically.

B. The Equal Protection Mandate Requires That Indigents Be Accorded Effective Appellate Review Where It Is Extended as of Right to Others.

The respondent agrees that a state is constitutionally required to afford adequate appellate review to indigent habeas corpus applicants where such review is open to others (R. brief 10). Nonindigent petitioners can appeal and obtain meaningful review with the assistance of a stenographic transcript in Iowa. In this connection, respondent concedes that a hearing transcript would be helpful in habeas corpus appeals, but suggests in essence that the petitioner should be required to piece an appeal record together from other sources (R. brief 12). This suggestion does not meet the equal protection mandate.

The respondent suggests that a petitioner without a transcript is in a position to prepare a manuscript of the evidence, presumably from petitioner's recollection (R. brief 15). The decision of this Court in *Hardy* v. *United States,* 375 U.S. 277, points out that recollections and notes, even of trained counsel, are insufficient materials from which to prepare an effective appellate record. Requiring preparation from memory by the layman petitioner in the instant case would be incompatible with principles of fairness and equality.

One of the purposes of providing official court reporters was to preserve a full and accurate record of trial proceedings. *Tate* v. *U.S.,* 359 F.2d 245, 255. As stated in *Hendrix* v. *Rhay,* 56 Wash.2d 420, 424, 353 P.2d 878, 880 (1960):

> To expect and to require this petitioner to be able to recite errors occurring at his trial is to treat him with less than that degree of fairness demanded by the con-

> cept of due process and it certainly is not within the spirit of the decision of this court in In re Woods, supra.

See also *Boles* v. *Kershner,* 320 F.2d 284; *State* v. *Larson,* 62 Wash.2d 64, 381 P.2d 120 (1963).

An evidentiary habeas trial was held in this case in which witnesses testified on various matters in issue. Petitioner, a man with a sixth grade education, would be hard put to manuscript the sworn testimony from memory. Petitioners with means are not required to do so. To force this petitioner to prepare an abstract of the testimony from memory violates petitioner's right to equal protection of law.

But the respondent urges that the trial court can assist the petitioner in preparing a record for appeal (R. brief 15). Even should this be deemed advisable, there is no duty enjoined upon the trial court to aid the prisoner in this manner under Iowa law. Rule 340(c) Iowa Rules of Civil Procedure provides that the judge's duty to settle the record arises only after the abstract of record and trial transcript are filed in trial court. The transcript an indigent petitioner cannot obtain; the abstract he may be unable to prepare from memory. Neither the Iowa Rules of Civil Procedure or the Iowa Supreme Court Rules impose any duty on the trial court to assist in the preparation of an indigent's appellate record in the first instance, and no case so holds. Consequently, the petitioner cannot insist on such assistance as a matter of right, even to the extent of requiring the court reporter to read back part of the trial transcript to the court for whatever aid that might provide (R. brief 16). It is relevant to point out that the petitioner

with means is not relegated to such an uncertain procedure in developing his abstract of record. He has the transcribed report of the trial laid out before him for reference.

Respondent suggests that a transcript of the habeas hearing may be unnecessary where a transcript of the criminal trial is available (R. brief 19, 23). Several factors militate against the position of the respondent here. The criminal trial transcript will not reflect procedural errors which occur in the habeas corpus trial. See *Hunsucker* v. *Balkcom,* 220 Ga. 73, 137 S.E.2d 43 (1964); *Sewell* v. *Lainson,* 244 Iowa 555, 564, 569, 57 N.W.2d 556, 561, 564 (1953); *Ex parte Holmes,* 397 S.W.2d 458 (1965).

In addition, points are frequently raised in the habeas corpus action which were not explored at the criminal trial and do not appear in that transcript. Such matters might include misconduct or incompetence of defense counsel, partiality on the part of some of the jurors who convicted the defendant, inflammatory publicity surrounding the trial which prejudiced defendant's right to fair trial, or coercion or threats which induced a plea or other action by a defendant. These and many other propositions raisable in habeas corpus may require testimony and evidence not contained in the original trial record. See e.g., *Pearce* v. *Cox,* 34 F.2d 884, 900, 901; *Sewell* v. *Lainson,* 244 Iowa 555, 568, 57 N.W.2d 556, 564; *Simpson* v. *State,* 278 Ala. 707, 179 So.2d 335 (1965). See also *Cochran* v. *Kansas,* 316 U.S. 255, 257.

In Iowa habeas corpus is triable as a law action, and upon review the question is whether there is substantial evidence to support the judgment of the trial court. *Thomas* v. *Purcell,* 252 Iowa 177, 180, 104 N.W.2d 823, 825 (1960). Such

review cannot be accomplished without a transcript and record reflecting the evidence presented in the habeas trial.

A habeas corpus hearing transcript is essential to full appeal in that such record will reflect evidence presented in the habeas corpus action on the issues involved. Examples from the instant case illustrate the point. Here an evidentiary hearing was held, and witnesses testified regarding whether or not petitioner was represented by counsel at preliminary hearing, a critical stage of state process. 1964 Op. Ia. Atty. Gen. 160. An evidentiary record is needed to review the correctness of the court's decision in adjudicating the petitioner's claim on this point.

Petitioner further alleged that his court appointed counsel did not adequately prepare his trial defense due to lack of time (R. 17, 24). Respondent suggests that the report of the original criminal trial will dispose of this issue. Case law indicates that a petitioner's evidence may properly be taken to show the extent of an attorney's investigation of a case, which matter is often not reflected in the pages of the criminal trial record. *Pearce* v. *Cox,* 354 F.2d 884, 901.

The original trial transcript will not reflect procedural errors occurring at a habeas corpus trial, nor will it show evidentiary matter developed at the habeas corpus hearing which must be reviewed to afford adequate appeal from the trial court's judgment. The original transcript might be introduced as evidentiary matter in the habeas trial, but frequently additional testimony is needed to supplement a post-conviction point only partly reflected in the trial record, and often the point raised by habeas corpus will not show in the original trial transcript at all. For these

reasons the transcript of the criminal trial is insufficient as a substitute for a habeas corpus transcript.

A further objection to the state's failure to provide petitioner with a transcript of the proceedings in habeas corpus exists. The basic rule governing appeal records in Iowa is Rule 340(a), Iowa Rules of Civil Procedure. This rule calls for the filing of a transcript with the trial court preliminary to settling the appeal record, where meaningful appeal on an evidentiary record is sought. As stated in Miller, *Appellate Procedure,* 29 Iowa L.Rev. 48, 51:

> The reporter's transcript must be filed at the same time that the typewritten proposed abstract is filed and it is impossible to prescribe a uniform rigid rule for the time within which the reporter's transcript should be filed.

See also *Schroder* v. *Claypool,* 235 Iowa 135, 140, 16 N.W. 2d 1, 3 (1944), stating that the filing of the reporter's transcript as provided by Rule 340(a) is a necessary preliminary to any settling of the appeal record. The *Schroder* case was overruled in part on another ground in *Stolar* v. *Turner,* 236 Iowa 628, 19 N.W.2d 585 (1945), but the above rule was unaffected.

In his application to the Iowa Supreme Court for a transcript, the petitioner pointed out that without a transcript he was foreclosed from pursuing all phases of his appeal (R. 39). Respondent argues that although Rule 340(a) may require the filing of a transcript, the Iowa Supreme Court has informally dispensed with other appeal rules such as the printing of records and briefs in certain unreported cases involving indigents (R. brief 16, 17). None of these cases announce a standing waiver of

the transcript filing requirement under Rule 340(a), and none assures this petitioner that he can proceed without regard to that requirement.

The respondent urges that the Iowa Court has authority to revoke or change the rule in question (R. brief 16). But nowhere in the promulgated Rules of the Supreme Court of Iowa does there appear a rule establishing waiver of the transcript requirements of Rule 340(a) for indigent prisoners. Rules of the Supreme Court of Iowa, Iowa Code (1962). Respondent's arguments do not write the transcript filing requirements of Rule 340(a) out of the law, and the waiver of other appeal rules in unreported cases does not constitute notice to the petitioner that he has a right to proceed in derogation of this requirement. Significantly, even if there were no filing requirement in Rule 340(a), petitioner is severely impaired in his efforts to prepare an adequate appeal record when no transcript is available.

C. Where a Stenographic Transcript Is Essential to Adequate Appellate Review, It Is Unfair to Deny Such Transcript to an Indigent Petitioner.

It is clear that the framers of the Iowa appeal provisions expected the appellant seeking effective review to be armed with a stenographic transcript of his trial. This is essential for meaningful appeal. No established substitute for a transcript has been created in Iowa appellate procedure. The controlling appeal rules specifically contemplate a transcript as a necessary basis for preparing the appeal record. As stated in the Comment by the Rules Advisory Committee discussing preparation of the appeal record, "In practice the procedure would be very simple. The

appellant and appellee would work together in preparing and designating portions of the transcript to be presented." 4 Cook, Iowa Rules of Civil Procedure, 199 (1951). See also Note, *Form of Appellate Records in Iowa,* 48 Iowa L.Rev. 77, 81 (1962).

The Iowa Supreme Court has expressed essential agreement with this proposition by ruling that the furnishing of a transcript is required to afford the indigent defendant an adequate appeal from his conviction. *Weaver* v. *Herrick,* 140 N.W.2d 178 (Iowa 1966). This is the rule in criminal causes. Why does the court apply a different rule in habeas corpus appeals?

Perhaps the reason lies in a continuing misconception regarding the habeas corpus process. Iowa has labelled this a civil proceeding, and based on this label the trial court denied petitioner a stenographic transcript (R. 36). The subject Iowa Supreme Court order cites *Waldon* v. *District Court of Lee County,* 130 N.W.2d 728, 729 (Iowa 1964), as authority for denying the request for a transcript, and in the cited case reference is made to the civil nature of habeas corpus (R. 44). This point is also developed in *Hoskins* v. *Bennett,* 256 Iowa 1370, 1376, 131 N.W.2d 510, 514 (1964), where the court articulated approval of the civil proceeding rationale as a ground for denying a transcript to an indigent in habeas corpus.

The use of the civil label should not continue to persist as a means of suppressing constitutionally protected rights, especially following the unanimous decision of this court in *Smith* v. *Bennett,* 365 U.S. 708, which dealt specifically with that point. Indeed, the respondent commendably agrees that the use of the civil label as a basis for denying a transcript to the petitioner is error (R. brief 7, 10).

Adequate appellate review is not available in Iowa without a transcript to assist the petitioner. Respondent seizes on the language of *Draper* v. *Washington*, 372 U.S. 487 which raises the possibility of a state providing the equivalent of a transcript. In the context of the appeal procedures applicable to the case at bar, no substantial equivalent has been established, and a transcript is critical under Iowa law.

The respondent would have the petitioner piece together a record under various theories, resulting in an appeal record in no way equivalent to that of the petitioner with funds. Respondent's suggestions are not consistent with equal protection of law. The petitioner, unaided by the guiding hand of counsel, has made commendable efforts throughout the case to secure his equal protection rights. At all relevant times the petitioner made appropriate application for stenographic transcript, pointing out that an evidentiary hearing was had in the case and that such transcript was necessary to prosecute an effective appeal (R. 38, 34).

If Iowa wishes to provide a report of the habeas trial equivalent to a transcript for indigent prisoners, so far it has not done so. No such equivalent or substitute is available to the petitioner under current law.

Many states have made advances in the area of protection of constitutional rights to indigent applicants for post-conviction relief. The Attorney General of Iowa invited responses from the Attorneys General of the other 49 states regarding transcript rights accorded indigents in post-conviction cases. Forty-four jurisdictions responded by letter summarizing their position, and the Iowa Attorney General has courteously provided these letters to the petitioner.

Thirty of the responding states permit appeal as a matter of right from habeas corpus or other post-conviction proceedings, and twenty-six of these thirty provide the indigent with a free hearing transcript when he appeals a denial of post-conviction relief. The establishment of the right to transcript has been variously accomplished in these jurisdictions through case law, statutes, and Supreme Court Rules. Of the responding states, approximately 75% of those providing mandatory or discretionary review of post-conviction proceedings afford a transcript at public expense to the indigent appellant.

Lane v. *Brown*, 372 U.S. 477, makes clear that the indigent petitioner in habeas corpus is to be given as adequate and effective appellate review as that given habeas applicants with funds. The practice in a large number of states to afford transcript rights to indigent prisoners assists greatly in meeting the challenge of providing equal justice under law. The current Iowa practice of refusing to provide such transcript as illustrated in the instant case fails to respond to this challenge, and falls below the constitutional standard.

Conclusion

The facts of this case provide compelling documentation of the need to insure equal treatment to the poor in our courts. Imprisoned for half a year without trial, the petitioner was sentenced to a term not to exceed five years when he was convicted of stealing a pump worth $25.00. That the prisoner spent the extended period before trial in jail was attributable to his financial inability to provide bail, and this prolonged delay was termed regrettable by the Iowa Supreme Court.

At the penitentiary, petitioner's lack of funds blocked him from effective review on his habeas corpus claims, while petitioners with funds have access to full review of such claims on appeal. Equal protection of laws requires that the interests of rich and poor be weighed in equal scale. The Iowa procedure explored in this case denies transcripts and meaningful appeal to indigents while providing full review to others. Discriminating as it does by predicating effective appeal in habeas corpus on ability to pay, this procedure fails to accord the petitioner his right to equal protection of the laws.

A trial transcript is critical to meaningful appellate review. The Iowa Supreme Court did not deal in potential substitutes in deciding what tools were needed to prepare an adequate appeal record in *Weaver* v. *Herrick,* 140 N.W.2d 178 (Iowa 1966). When confronted with this problem in connection with direct appeals the court announced that a transcript was required to obtain such review. No equivalent to a transcript is provided under Iowa law, and an indigent petitioner in habeas corpus should not be required to appeal without the means of presenting his contentions to the appellate court which are as good as those available to nonindigent petitioners with similar contentions. This principle applies with particular force to the historic legal process for challenging loss of liberty and safeguarding individual rights, the writ of habeas corpus.

Respectfully submitted,

RONALD L. CARLSON
College of Law
University of Iowa
Iowa City, Iowa
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1966.

Lawrence Long, Petitioner, *v.* The District Court of Iowa, in and for Lee County, Fort Madison, Iowa.	On Writ of Certiorari to the Supreme Court of Iowa.

[December 5, 1966.]

Per Curiam.

Petitioner was convicted of larceny and sentenced on October 21, 1963, to a term not to exceed five years. This conviction was affirmed on appeal to the Supreme Court of Iowa (*State v. Long*, 130 N. W. 2d 663 (Iowa, 1964)), and petitioner is currently serving his sentence in the state penitentiary. On January 13, 1965, petitioner sought a writ of habeas corpus in the District Court of Iowa, Lee County, and contended, *inter alia*, that he had been denied counsel at the preliminary hearing and that he himself had been incompetent at the time. After an evidentiary hearing at which petitioner was not afforded the assistance of court-appointed counsel, the District Court found against petitioner on the facts of his claims.[1] Petitioner thereupon applied to the

[1] As to the claim of lack of counsel at preliminary hearing, the State now concedes that petitioner was not in fact represented at that time (although the District Court found to the contrary). Petitioner alleged in his petition for habeas corpus that a guilty plea obtained at the preliminary hearing was introduced as an admission at his criminal trial. The State concedes that if this is true, petitioner "probably is entitled to relief in habeas corpus under *White* v. *Maryland*, 373 U. S. 59." The Attorney General of Iowa has ruled that *White* is applicable to preliminary hearings in Iowa because guilty pleas, if made at that time, may later be used as admissions of guilt. 1964, Opinions of the Attorney General of Iowa, 160 (October 5, 1964).

District Court for appointment of counsel and for a free transcript of the habeas corpus proceedings, for use on appeal. The District Court denied these motions on the following ground: "Habeas corpus being a civil action there is no provision in the law for the furnishing of a transcript without the payment of fee, or for the appointment of counsel." Petitioner sought certiorari to this decision from the Supreme Court of Iowa. Certiorari was denied without opinion [2] by that court.[3] On petition for a writ of certiorari to the Supreme Court of Iowa, this Court granted the writ limited solely to the refusal to furnish petitioner, an indigent, with a transcript of the habeas corpus proceeding, for purpose of appeal.

The judgment below must be reversed. The State properly concedes that under our decisions in *Smith* v. *Bennett*, 365 U. S. 708 (1961), and *Lane* v. *Brown*, 372 U. S. 477 (1963), "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith* v. *Bennett*, *supra*, at 709. We specifically held in *Smith* that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration. And we held in *Lane* that the same rule applies to protect an indigent against a financial obstacle to the exercise of a state-created

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[2] The court's order reads: "Petition for certiorari filed, considered, and denied. See in this connection, *Waldon* v. *District Court of Lee County, Iowa*, 130 N. W. 2d 728." The *Waldon* case held only that a State need not provide appointed counsel on appeal from the denial of habeas corpus; it does not so much as refer to the transcript problem, to which this Court limited the grant of certiorari in this case.

[3] Petitioner's notice of appeal to the Supreme Court of Iowa was timely and properly filed. His appeal is pending before that court, and disposition has been stayed until the outcome of this preliminary case.

right to appeal from an adverse decision in a post-conviction proceeding.

In *Lane* v. *Brown, supra,* the Court reaffirmed the fundamental principle of *Griffin* v. *Illinois,* 351 U. S. 12 (1956), that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U. S., at 19; 372 U. S., at 483. The Court in *Lane* went on to observe that *Smith* had established "that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings." 372 U. S., at 484. See also *Eskridge* v. *Washington State Board,* 357 U. S. 214 (1958); *Burns* v. *Ohio,* 360 U. S. 252 (1959); *Draper* v. *Washington,* 372 U. S. 487 (1963).

The State suggests that there may be alternative ways of preparing, for purposes of appeal, an account of the relevant proceeding at the trial level. Cf. *Draper* v. *Washington, supra.* In the present case, a transcript is available and could easily have been furnished. We need not consider a possible situation where a transcript cannot reasonably be made available and adequate alternatives are made available by the State. Accordingly, the judgment below must be reversed and the cause remanded to the Supreme Court of Iowa for further proceedings not inconsistent with this opinion.

Reversed and remanded.